89-464

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GEORGE W. WILSON, Et Al., - - - Petitioners,

versus

PAT CANTERINO, A/K/A
PAT WILLIAMS, Et Al., - - - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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81 pp

QUESTIONS PRESENTED

As a result of a finding of a disparity of access to the courts between a class of female inmates and some male inmates in the Kentucky corrections system, the Sixth Circuit Court of Appeals affirmed the district court's remedial order which included affirmative "sex-conscious" relief even though there was no finding of an intent to discriminate, no member of the class established an inability to receive any needed legal services and no such program was provided male inmates.

The questions presented are:

1. Whether an order to hire private counsel to assist female inmates is constitutionally improper under the Due Process Clause or the Equal Protection Clause when the remedial order also directed specific improvements which created identical resources for access to the courts to female and male inmates.
2. Whether affirmative "sex-conscious" relief granted to female inmates in an action under 42 U.S.C. § 1988 is constitutionally improper when the record is devoid of any evidence of an intent to discriminate and resources identical to those available to male inmates were ordered.
3. Whether the Equal Protection Clause when applied in a female penal institution requires equality rather than parity of treatment among female and male inmates.
4. Whether an order to hire private counsel to assist female inmates is constitutionally improper when the court failed to limit the duties of private counsel and set no standard by which such affirmative relief could end.

LIST OF PARTIES

The parties to the proceedings below were the Petitioners, George Wilson, Secretary, Kentucky Corrections Cabinet; Betty Kassulke, Superintendent, Kentucky Correctional Institution for Women; Barry Benner, Associate Superintendent, Kentucky Correctional Institution for Women; Gail Chandler, Associate Superintendent, Correctional Institution for Women; Raymond Barber, Superintendent, Kentucky Department of Education; and the Respondents, Pat Canterino, a/k/a Pat Williams: Susie M. Bland, Tina Stone, Wanda Hicks, Joan Starks, Cecilia A. Gonzalez, Shirley LaCourse, as representatives of the plaintiff class of inmates incarcerated at the Kentucky Correctional Institution for Women.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS ..... iii–vi

OPINIONS BELOW 1– 4

JURISDICTION 4

STATEMENT OF THE CASE 4–11

REASONS FOR GRANTING THE WRIT 12–27

ARGUMENT:

I. The Sixth Circuit Opinion Extends the Principles of the Due Process Clause and the Equal Protection Clause Beyond Constitutional Limits and Conflicts with the Decisions of This Court, the Sixth Circuit and Other Courts. 12–18

A. Affirmative sex-conscious relief is not available in equal protection claims pursued under Section 1983 against state corrections officials without a showing of intent to discriminate. . 12–18

II. This Opinion Creates a Conflict with *Bounds* and *Murray*, With the Other Circuits and Within the Sixth Circuit. 19–25

A. The order to hire private counsel exceeds the obligations of state officials to provide access to the courts. 19–25

III. The Principles of Federalism and Comity Prohibit Overbroad and Intrusive Remedies. 25–27

A. This order sets no limits and no standards by which its effectiveness can be reviewed. 25–27

CONCLUSION 28

PAGE

APPENDIX 1a–45a

Petition for Rehearing Denied 1a

Opinion of the Court of Appeals for the Sixth Circuit 2a–12a

Memorandum Decision of the United States District Court for the Western District—September 18, 1986 ..... 13a–18a

Memorandum Decision of the United States District Court for the Western District—February 14, 1983 ..... 19a–35a

Relevant portions of Memorandum Decision of the United States District Court for the Western District—July 26, 1982 ..... 36a–45a

TABLE OF AUTHORITIES

PAGE

Barefield v. *Leach*, No. 10281 (D. N.M. 1974) 12

Batton v. *North Carolina*, 501 F. Supp. 1173 (E.D. N.C. 1980) 12

Bell v. *Wolfish*, 441 U.S. 520 (1979) 25

Bounds v. *Smith*, 430 U.S. 817 (1977) 6, 7, 9, 13, 17, 19, 21, 23, 24

Bukari v. *Hutto*, 487 F. Supp. 1162 (E.D. Va. 1980) .. 12

Campbell v. *Miller*, 787 F. 2d 217 (7th Cir. 1986), *cert. den'd*, 479 U.S. 1019 (1986) 21

Canterino v. *Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982) 2, 5, 18

Canterino v. *Wilson*, 869 F. 2d 948 (6th Cir. 1989) ... 18

Cepulonis v. *Fair*, 732 F. 2d 1 (1st Cir. 1984) 21

Cruz v. *Hauck*, 762 F. 2d 1230 (5th Cir. 1985) 21

Cruz v. *Hauck*, 627 F. 2d 710 (5th Cir. 1980) 21

Dawson v. *Kendrick*, 527 F. Supp. 1252 (S.D. W.Va. 1981) 12

Glover v. *Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), *aff'd sub nom. Cornish* v. *Johnson*, 774 F. 2d 1161 (6th Cir. 1985) 10, 13, 18

Gutierrez v. *Mun. Ct. of S.E. Judicial Dist.*, 838 F. 2d 1031 (9th Cir. 1988) 14

Harrington v. *Holshouser*, 741 F. 2d 66 (4th Cir. 1984) 21
cert. den'd 442 U.S. 911 (1979) 22

Holt v. *Pitts*, 702 F. 2d 639 (6th Cir. 1983) 11, 24

Hooks v. *Wainwright*, 775 F. 2d 1433 (11th Cir. 1985). 22

Hoptowit v. *Ray*, 682 F. 2d 1237 (9th Cir. 1982) 25

Johnson v. *Avery*, 393 U.S. 483 (1969) 11

Kelsey v. *Minnesota*, 622 F. 2d 956 (8th Cir. 1980) ... 21

Kendrick v. *Bland*, 740 F. 2d 432 (6th Cir. 1984) 11, 26

Kendrick v. *Bland*, 541 F. Supp. 21 (W.D. Ky. 1981).. 2, 5

Kentucky Dept. of Corrections v. *Thompson*, 109 S. Ct. 1904 (1989) 2

PAGE

Lindquist v. *Idaho State Board of Corrections*, 776 F. 2d 851 (9th Cir. 1985) 21–22

Local 28 Sheet Metal Workers' Intern'l. Ass'n v. *EEOC*, 478 U.S. 421 (1986) 16

McMurry v. *Phelps*, 533 F. Supp. 742 (W.D. La. 1982), *rev'd on other grounds*, *Thorne* v. *Jones*, 765 F. 2d 1270 (5th Cir. 1985) 12

Massachusetts v. *Feeney*, 442 U.S. 256 (1979) 15

Mescall v. *Burrus*, 603 F. 2d 1266 (7th Cir. 1979) 14

Mitchell v. *Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976) 12

Morrow v. *Harwell*, 768 F. 2d 619 (5th Cir. 1985) ... 21

Murray v. *Giarratano*, 109 S. Ct. 2765 (1989) . . 19, 20, 21, 23

Newman v. *Alabama*, 683 F. 2d 1312 (11th Cir. 1982). 25

O'Lone v. *Shabazz*, 482 U.S. 342 (1987) 14, 25

Peterkin v. *Jeffes*, 855 F. 2d 1021 (3rd Cir. 1988) 21

Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 25

Procunier v. *Martinez*, 416 U.S. 396 (1974) 25

Rizzo v. *Goode*, 423 U.S. 362 (1976) 25

Rhodes v. *Chapman*, 452 U.S. 337 (1981) 25

Ruiz v. *Estelle*, 679 F. 2d 1115 (5th Cir. 1982) 25

Smith v. *Bounds*, 538 F. 2d 541 (4th Cir. 1975), *aff'd*, *Bounds* v. *Smith*, 430 U.S. 817 (1977) 13

Straub v. *Monge*, 815 F. 2d 1467 (11th Cir. 1987) 23

Turner v. *Safley*, 482 U.S. 78 (1987) 14, 25

United States v. *Houston*, 12 M.J. 907 (NMCMR 1982) 12

Walker v. *Mintzes*, 771 F. 2d 920 (6th Cir. 1985) 11, 21, 23, 24

Washington v. *Davis*, 426 U.S. 229 (1976) 14

Williams v. *Leeke*, 584 F. 2d 1336 (4th Cir. 1978), *cert. den'd*, 442 U.S. 911 (1979) 21

Wolff v. *McDonnell*, 418 539 (1974) 11, 19, 21, 23

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PAT CANTERINO, A/K/A
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, George Wilson, et al., respectfuliy pray that a Writ of Certiorari issue to review the judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in the above titled proceeding on April 10, 1989. Petition for rehearing en banc was denied June 22. 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported; it is reprinted in the appendix hereto pages 2a-12a, *infra.*

The memorandum decision of the United States District Court for the Western District of Kentucky (Johnstone, E.H.), dated July 26, 1982 is reported at 546 F. Supp. 174 (W.D. Ky. 1982) and relevant por-

tions are reprinted in the appendix hereto, pages 36a-45a, *infra*.

The memorandum decision of the United States District Court for the Western District of Kentucky (Johnstone, E. H.), dated February 14, 1983, is reported at 562 F. Supp. 106 (W.D. Ky. 1983) and is reprinted in the appendix hereto, pages 19a-35a, *infra*.

The memorandum decision of the United States District Court for the Western District of Kentucky (Johnstone, E. H.), dated September 18, 1986, is reported at 644 F. Supp. (W.D. Ky. 1986) and is reprinted in the appendix hereto, pages 13a-17a, *infra*.

After a four-week bench trial challenging the total conditions of the Kentucky Correctional Institution for Women [hereinafter KCIW] at Peewee Valley, Kentucky before the United States District Court for the Western District (E.H. Johnstone) the district court entered a memorandum decision on July 26, 1982. *Canterino* v. *Wilson,* 546 F. Supp. 174 (W.D. Ky. 1982).

In its 1982 order the court addressed access to the courts and concluded that the female inmates' access had been inadequate in the past and was not comparable to that provided the male inmates incarcerated at Kentucky State Penitentiary and the Kentucky State Reformatory [hereinafter KSP and KSR] as provided in a 1980 federal consent decree.[1] This con-

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[1] *Kendrick* v. *Bland,* 541 F. Supp. 21, 34-35 (W.D. Ky. 1981). [Portions of the consent decree regarding visitation at KSR were reviewed by this Court last term. *Kentucky Dept. of Corrections* v. *Thompson*, 109 Set. 1904 (1989).]

clusion was based on a review of the resources available at KCIW and not based upon any evidence that any member of the class was unable to receive any needed legal services for procedures inside the institution or for any other purpose. (App. 36a-45a).

In order to remedy this disparity and past inadequacy the court directed defendants: 1) to provide a law library identical to that provided male inmates at the KSP and KSR pursuant to the relevant provision of the 1980 consent decree; 2) to substantially increase the amount of non-program hours for access to the law library; and 3) to provide the equivalent of at least one half-time attorney who would assist female inmates in all areas including habeas corpus and all other civil matters in which they have a demonstrated need.

Defendants requested the court to reconsider directing defendants to hire a half-time attorney on the grounds that it was not constitutionally required and no such assistance was provided at any male institution including those operating under the consent decree. The Defendants did not object to any other provision of the remedial order regarding access to courts. Even though identical resources had been made available as ordered, on February 14, 1983, the district court denied the relief sought by defendants.

On September 17, 1986, over four years later, the district court issued its final memorandum opinion and order concluding that in order to provide meaningful access to the courts for female inmates at KCIW and

to remedy a past inadequacy and disparity (pre 1983), the state must provide not only the identical resources afforded the male inmates at KSP and KSR under a 1980 consent decree but the state must also hire a half-time attorney to assist and train female inmates in any demonstrated legal need.

On defendants' appeal, the Sixth Circuit Court of Appeals on April 10, 1989, entered a judgment and opinion affirming the order. (App. 2a-12a).

A petition for en banc rehearing was denied on June 22, 1989. (App. 1a).

JURISDICTION

The jurisdiction of this court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This appeal concerns an equal protection and due process question arising from a prison conditions suit filed by the female offenders incarcerated at KCIW.

On October 31, 1980, the plaintiff class filed a complaint challenging the totality of the conditions at KCIW.[2] On February 24, 1982, plaintiff class filed their second amended complaint again challenging the totality of the conditions at the institution, adding new claims unrelated to the questions presented today. With respect to access to courts, plaintiffs complained that inmates at KCIW did not have adequate access to

[2]Docket #3, 10/31/80.

courts because the law library was inadequate and inferior to the resources available to male prisoners.[3] The class sought a declaratory judgment and injunctive relief.

Subsequent to a four-week trial in April and May of 1982, the district court entered a memorandum opinion and order addressing all conditions and all claims tried before the court. *Canterino* v. *Wilson, supra.*

In its 1982 order the court found when the lawsuit was initiated in October of 1980 the law library was woefully inadequate, but, concluded that after the suit was filed significant improvements had been made. At the time of trial in 1982, the law library was only missing some of the books provided for in a 1980 consent decree which resolved a conditions suit at two male institutions.[4] (App. 39a-40a). The court found disparities at KCIW with respect to the hours the law library was open during non-program time as well as access to an attorney from the Office of Public Ad-

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[3]Docket #97, 2/24/82.

[4]The consent decree was approved by this same district judge in May 1980 only six months prior to the initiation of this action. Under the terms of that consent decree implementation of the majority of the terms was not required until November 1980, unless otherwise provided. The law library did not have to be updated until August 1980, two months before this suit was filed. *Kendrick* v. *Bland*, 541 F. Supp. 21-22 [§ 1.A], 34-35, 47 (W.D. Ky. 1981).

vocacy, again citing the 1980 consent decree as its benchmark for comparison.[5]

As a result of the court's finding a past inadequacy and disparity between male and female inmates with respect to access to the courts in 1982 the district court concluded:

> *As noted in the findings of facts, defendants have made substantial progress in bringing their law library into compliance with minimum standards.* Here again, however, there is still a substantial disparity between the resources available to women inmates and those provided for male inmates under § 8 of the *Kendrick* and *Thompson* Consent Decree. To bring access to courts to Constitutional parity, defendants must 1) supply a library equivalent to those required for males at KSP and KSR, 2) substantially increase the amount of non-program time the library is open, and 3) provide the equivalent of at least one half-time attorney, who will assist inmates in all areas, including habeas corpus and other civil matters, in which they have a demonstrated need. These minimal steps are required by both the equal protection clause and the decision of the Supreme Court in *Bounds v. Smith,* 430 U.S. 817, 97 S. Ct. 1491,

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[5]As acknowledged by the dissent (Guy), the Office of Public Advocacy assists indigent inmates in pre-and post-conviction cases pursuant to Kentucky Revised Statutes Chapter 31 and is not under Corrections' jurisdiction/control for any purpose.

The district court acknowledged the statutory authority of Office of the Public Advocacy in its 1983 opinion, yet appears to have found Corrections' defendants accountable for disparities relating to services provided by that office. (App. 25a).

— L. Ed. 2d — (1977). (App. 40a). [emphasis added].

On that same date the court entered an order in conformity with its opinion. (App. 41a-45a).

A timely notice of appeal and motion to stay were filed.[6] Subsequent to the entry of this 1982 order court conferences were conducted to resolve, if possible, defendants challenge to that portion of the remedial order directing defendants to hire a half-time attorney. In an attempt to resolve the challenge, the court ordered supplemental briefs.[7]

On February 14, 1983, after reviewing the supplemental briefs the district court entered a second order concluding the hiring of a half-time attorney was required by the Equal Protection Clause and the decision of this Court in *Bounds* v. *Smith*, 430 U.S. 817 (1977). In its order the district court determined:

> . . . since the filing of this action, defendants are commended for their significant efforts to improve the resources of the KCIW law library. In addition, the availability of the library has been extended to fifteen hours on [of] non-program time per week, the minimum imposed by this court's order July 26, 1982. (App. 21a).

The court ruled that even though the law library and its hours had been expanded as ordered and even though trained inmate law clerks were available as well as an attorney from the Office of Public Advocacy to

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[6]Docket #206, 207, 8/3/82.

[7]Docket #223, 10/22/82.

assist in criminal matters, these tools were still insufficient to provide meaningful access without the hiring of the half-time attorney. Primarily because of a history of a lack of self help and access to experienced writ writers female inmates had an entitlement to private counsel. (App. 19a-36a). The court directed defendants to submit a plan providing for the hiring of a half-time attorney. With objection the defendants submitted a plan for private counsel assistance while at the same time not waiving their right to appeal.

Defendants continued to object to the hiring of a half-time attorney through appropriate motions. Conferences were conducted and additional briefs were again ordered by the court permitting additional proof by affidavit.[8]

The supplemental information provided the court demonstrated 1) female inmates had the identical law library available to male inmates as required by the 1980 consent decree, 2) the number of female inmate legal aides had been increased, and, 3) the female legal aides received the same legal aide training as required by the 1980 consent decree. Further, of the legal aides then available at KCIW, one had 17 years experience in the legal field, an AA degree and additional college credits earned while incarcerated; one had a high school diploma with three semesters of college, and one had received a G.E.D. and completed

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[8]Docket #514, 7/23/85.

two semesters of college while incarcerated at KCIW achieving a GPA of 3.3.[9]

After a review of the additional information on September 15, 1986, the district court issued its final order and concluded: ". . . in order to provide meaningful access to the female inmates at KCIW, the state should provide the same opportunities accorded to the male inmates at other prisons." (App. 17a). The court determined the "same opportunities" could be achieved only by providing legal assistance through a half-time attorney. The court ruled such a remedy was necessary because past inadequate resources and disparities had prevented female inmates from gaining experience comparable to that available to the male inmates through the male inmate writ writers. (App. 17a).

Defendants were again directed to hire a part-time attorney initially for eighteen months to "assist and train the female inmates in all areas of demonstrated legal need". (App. 17a)

On appeal defendants challenged this order because it constituted an overbroad and intrusive remedy and was improper both under the Equal Protection Clause and the Due Process Clause as set out by this Court under *Bounds* v. *Smith,* 430 U.S. 817 (1977).

On appeal the Sixth Circuit recognized no class member testified she had wanted any legal services she had not been able to receive. (App. 3a). In addition, both courts below recognized that male inmates

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[9]Docket #338, 10/3/84.

in Kentucky did not have private counsel to assist them in legal matters. Both courts below did acknowledge that attorneys from the Office of Public Advocacy, pursuant to a separate Kentucky statutory scheme, provided services for criminal matters to all indigent male and female inmates.[10]

The Sixth Circuit found no abuse of discretion even when there was no evidence of a denial of access to the courts to the class as a whole or to any member standing alone. (App. 3a). Although the remedy was to correct an equal protection violation the Sixth Circuit affirmed without requiring any proof of an intent to discriminate against the female offenders. (App. 12a).

The Sixth Circuit did recognize there were no recent appellate court decisions but for an earlier decision of its own addressing the application of the Equal Protection Clause in a female penal facility. In that opinion it had concluded the Equal Protection Clause does not require equality of treatment but parity. *Glover* v. *Johnson,* 478 F. Supp. 1075 (E.D. Mich. 1979), *aff'd sub nom. Cornish* v. *Johnson,* 774 F. 2d 1161 (6th Cir. 1985) (mem.). Yet in this instance the Sixth Circuit affirmed an order requiring more than equality.

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[10]The district court initially concluded, however, that the service provided at KCIW by the Office of Public Advocacy was not comparable to that offered the male inmates at KSP and KSR based on an hours per inmates ratio, not on whether services needed were provided. (App. 25a-40a).

Even the Office of Public Advocacy was not named as a defendant the district court found that the state defendants did not explain this disparity. (App. 25a). (see ftn. 5).

The Sixth Circuit also recognized that neither the majority of the circuits nor this Court has not mandated that all legal resources be provided inmates in order to provide meaningful access. Yet in this case affirmed an order requiring the provision of all legal resources without evidence of a denial of access or an intent to discriminate.

A petition for rehearing en banc was filed. Defendants argued that the opinion was contrary to the decisions of this Court, in particular, *Bounds* v. *Smith,* 430 U.S. (1977), *Wolff* v. *McDonnell,* 418 U.S. 539, (1974) and *Johnson* v. *Avery,* 393 U.S. 483 (1969).

Defendants also argued the opinion conflicted with the Sixth Circuit's own opinions, in particular, *Walker* v. *Mintzes,* 771 F. 2d 920 (6th Cir. 1985); *Kendrick* v. *Bland,* 740 F. 2d 432 (6th Cir. 1984); *Holt* v. *Pitts,* 702 F. 2d 639 (6th Cir. 1983); *Glover* v. *Johnson,* 478 F. Supp. 1075 (E.D. Mich. 1979), *aff'd sub nom. Cornish* v. *Johnson,* 774 F. 2d 1161 (6th Cir. 1985) (mem.).

The petition for rehearing en banc was denied on June 22, 1989. This petition now follows.

REASONS FOR GRANTING THE WRIT

I. The Sixth Circuit Opinion Extends the Principles of the Due Process Clause and the Equal Protection Clause Beyond Constitutional Limits and Conflicts with the Decisions of this Court, the Sixth Circuit and Other Circuits.

A. Affirmative sex-conscious relief is not available in equal protection claims pursued under Section 1983 against state corrections officials without a showing of intent to discriminate.

The question for review is not whether female inmates are entitled to meaningful access to the courts or even whether the Equal Protection Clause entitles female inmates to comparable treatment. The question presented is whether the constitution mandates more than an equality of access to the courts for female than for male inmates. Defendants only challenge that portion of a remedial order which directed affirmative sex-conscious relief without a showing of an injury or an intent to discriminate on the part of state corrections officials.

The majority of federal court decisions addressing application of the Equal Protection Clause to incarcerated females are at the district court level.[11] Two circuit courts have reviewed the question as well.

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[11] *McMurry* v. *Phelps*, 533 F. Supp. 742 (W.D. La. 1982), *rev'd on other grounds*, *Thorne* v. *Jones*, 765 F. 2d 1270 (5th Cir. 1985); *United States* v. *Houston*, 12 M.J. 907 (NMCMR 1982); *Dawson* v. *Kendrick*, 527 F. Supp. 1252 (S.D. W.VA. 1981); *Bukari* v. *Hutto*, 487 F. Supp. 1162 (E.D. VA. 1980); *Batton* v. *North Carolina*, 501 F. Supp. 1173 (E.D. N.C. 1980); *Cornish* v. *Johnson*, 774 F. 2d 1161 (6th Cir. 1985); *Glover* v. *Johnson*, 478 F. Supp. 1975 (E.D. Mich. 1979), *aff'd sub nom. Mitchell* v. *Untreiner*, 421 F. Supp. 886 (N.D. Fla. 1976); *Barefield* v. *Leach*, No. 10281 (D. N.M. 1974).

In 1975 the Fourth Circuit found an unjustified disparity of access to courts regarding adequate legal research facilities for female inmates and directed the removal of the discrimination. *Smith* v. *Bounds,* 538 F. 2d 541, 545 (4th Cir. 1975), *aff'd, Bounds* v. *Smith, supra.* (see ftn. 7).

In 1985 the Sixth Circuit issued an opinion in which the facts were almost identical to the present case. There the Sixth Circuit affirmed an order to provide female inmates a legal education course comparable to that provided male inmates in order to train female inmates to help themselves. As the record there indicated, female inmates had had no access to that program either at that time or in the past. *Glover* v. *Johnson, supra.*

Generally the circuit and district courts have concluded, without much dispute, the Equal Protection Clause applies to incarcerated females. However, when fashioning a remedy to correct any disparity in treatment the courts have recognized the significant and substantial economic factors involved. By virtue of statistics alone, the male inmate population far exceeds the female population.[12] As a result, most remedial orders in this arena have directed "comparable treatment" or "parity of treatment" for female inmates and not the identical treatment provided similarly situated male inmates. This "economic reality"

[12]As noted by the dissent, two male institutions in Kentucky housed 2400 inmates while in comparison KCIW housed 150 females, the entire female population for the system. (App. 11a-12a; 36a, 39a).

analysis certainly comports with this Court's most recent opinions. *Turner* v. *Safley,* 482 U.S. 78 (1987); *O'Lone* v. *Shabazz,* 482 U.S. 342 (1987).

In all the decisions addressing similar equal protection claims for incarcerated females the courts found both unconstitutional conditions and disparate treatment. The remedies directed officials to correct the constitutional deficiencies as it related to the specific subject matter. With respect to disparities found by the courts, the officials were directed to correct those disparities by providing comparable treatment. No Court directed affirmative sex-conscious relief in order to make female felons "whole".

More importantly, this Court has ruled that in order to be awarded affirmative relief in an equal protection claim filed under Section 1983 an intent to discriminate must be established. In *Washington* v. *Davis,* 426 U.S. 229 (1976), this Court held that purposeful intent must be present before there is a violation of equal protection in a racial setting, and indicated that discriminatory purpose or intent is generally required in all equal protection cases.

Similarly, other circuits have held that without the demonstrating discriminatory purpose or intent by a defendant toward a plaintiff, a section 1983 equal protection claim must be dismissed. *Mescall* v. *Burrus,* 603 F. 2d 1266, 1271 (7th Cir. 1979), and *Gutierrez* v. *Mun. Ct. of S.E. Judicial Dist.,* 838 F. 2d 1031, 1047 (9th Cir. 1988). Purposeful discrimination is an essential element of an equal protection claim viola-

tion and no such intent or purposeful discrimination was demonstrated by the plaintiffs.

In *Massachusetts* v. *Feeney,* 442 U.S. 256 (1979) this Court applied the *Davis'* discriminatory purpose or intent requirement in a Section 1983 claim and stated:

> "Discriminatory purpose, . . . implies more than intent as violation or intent as awareness or consequence. It implies that the decision-maker, . . . selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group (citations omitted). *Id.* at 279.

As noted by the dissent in the Sixth Circuit opinion no intent to discriminate was ever established, and therefore, affirmative relief to remedy past disparities was not justified. In particular, Judge Guy, stated:

> As I understand the court's rationale, it found that the women inmates had been denied meaningful access because they had not been provided the *same* access as the male inmates. This rationale does not withstand scrutiny. Initially in order to establish an equal protection violation plaintiffs must show that the state intentionally discriminated against women prisoners as a group for no legitimate reason. It is undisputed that prior to the consent decree entered in the men's prison case in 1981, the law libraries at both KSR and KSP were also "woefully inadequate". Therefore, at most, the male inmates enjoyed the benefit of a constitutionally adequate library for two years longer than female inmates at KCIW. Furthermore, as the court pointed out, in 1982 the Kentucky prison

> system housed a minimum of 2400 male prisoners and only 150 female inmates. Undoubtedly, it is an historical fact that due to the extremely disproportionate number of male inmates, the men have, by virtue of longer and more varied experience, acquired a greater level of expertise in meeting their own legal needs. I glean from this fact no evidence of any intentional discrimination against women as a class by the state. Indeed, it appears that the OPA, which is charged by statute with providing legal assistance to inmates in criminal matters only, regulates its own hours and it is not subject to the complete discretion of prison authorities in its choice of number of hours of legal assistance to provide at any one facility. (App. 11a-12a).

In *Local 28 Sheet Metal Workers' Intern. Ass'n* v. *EEOC*, 478 U.S. 421 (1986) this Court approved the use of race-conscious affirmative relief. But there the lower court had an established egregious record of intentional race discrimination with a deliberate failure to remedy the violations as previously ordered. In addition, the affirmative relief was pursuant to a Title VII claim and the purpose of the relief order was to eradicate discrimination in an employment setting.

This case demonstrates no pervasive evidence of intentional discrimination. In fact, the district court commended the warden and her staff as being dedicated and committed to the welfare of the inmates, a fact the court noted was unusual in most prison conditions suits. And, the court continued to commend the state

for its efforts in its 1983 and 1986 orders. This case demonstrated a speedy attempt to eradicate the disparity, not a deliberate refusal to correct. By the time the parties began trial, in April 1982 defendants had expanded the law library and its facilities. Soon after the July 1982 decision, the remaining portions of the order, but for the hiring of the half-time attorney, were accomplished. (App. 192-362).

This Court in *Bounds, supra,* defined the state's obligations to provide access to the courts to all incarcerated felons. Once again recognizing the economic realities of such an obligation, this Court left the state officials an ability to experiment. This deference to state administrators has long been and continues to be the hallmark of this Court's opinions addressing the constitutional obligations of state officials to incarcerated felons.

Deference was not permitted in this case. The remedy required more than an equality or an identity of treatment solely to make up for past disparities, i.e. a lack of access to experienced writ writers. This affirmative sex-conscious relief was ordered even though the court recognized that in all other respects the legal resources available to female inmates met minimum constitutional standards and were equivalent to those provided male inmates. (App. 40a, 21a).

Even more puzzling is the conflict this decision creates with the Sixth Circuit's separate opinion in this same litigation. One other provision of the 1982 district court order was challenged by defendants on

appeal. Defendants questioned a ruling that a Kentucky statute had created a protected liberty interest to participate in community programs. In a reversal, the Sixth Circuit also ruled plaintiffs' claims of sexual disparity regarding the implementation of the community programs were unsubstantiated for many reasons, one of which was a failure to demonstrate any injury resulting from the supposed discrimination. *Canterino* v. *Wilson,* 869 F. 2d 948 (6th Cir. 1989).

No such injury was ever required to support the affirmative remedy now challenged. In fact, the Sixth Circuit acknowledged there was no evidence in the record that plaintiffs were unable to receive any needed legal services for any procedure inside the institution or otherwise. Therefore, in the same litigation, in two separate opinions, the Sixth Circuit applied different standards of law.

Similarly in *Glover, supra,* the Sixth Circuit Court affirmed an order requiring the state to provide a training program "comparable" to the male program for female inmates in order to train them to help themselves and each other in the presentation of their claims to the courts.

In this instance sex-conscious affirmative relief was upheld by the Sixth Circuit without a finding of any injury and without a finding of purposeful intent to discriminate. Constitutional principles which limit remedies for equal protection claims pursued under Section 1983 have been breached.

II. This Opinion Creates a Conflict with *Bounds* and *Murray*, with the Other Circuits and Within the Sixth Circuit.

A. The order to hire private counsel exceeds the obligations of state officials to provide access to the courts.

The order to hire private counsel exceeds the limits set by this Court in *Bounds, supra,* and more recently in *Murray* v. *Giarratano,* 109 S. Ct. 2765 (1989). In addition, the court set no limits or standards by which this remedy could cease to be an obligation of the state, but merely ordered private counsel be hired initially for an eighteen-month period.

Certainly by the time of the 1986 order, some four years after trial and the 1982 order, the legal resources available to females were equivalent to their male counterparts. Even though no proof had been established that any class member was unable to get any needed legal services and only because of the lack of history of self-help, affirmative sex-conscious relief was still found necessary.

This court in *Bounds, supra, Wolff, supra,* and now *Murray, supra,* has concluded inmates, while entitled to meaningful access, are certainly not entitled to private counsel especially when other adequate resources are available. Without question, deference must be given state officials to experiment with different options. In *Wolff, supra,* this court remanded the question of the adequacy of the Nebraska program by evaluating two variables: 1) the need for legal assistance in particular civil rights matters as well as

federal and state habeas petitions; and 2) whether the corrections facility is meeting that need. In this case, no such evaluation took place.

This decision was based solely on a comparison to those provisions contained in a consent decree. Besides the adequacy of the law library itself, no other evidence existed in the record to establish that a need for any legal assistance was not being met by the program at KCIW. This included legal needs for institutional administrative procedures as well as any civil or criminal matters. Surely, the absence of such evidence is crucial to concluding that any constitutional violation has occurred whether it is a violation of equal protection or access to the courts.

This excessive remedy was found to be unjustified by Judge Guy in his dissent. (App. 11a-12d). Certainly, if death row inmates are not entitled to private counsel to pursue post-conviction relief, private counsel is inappropriate in this instance when all other legal resources have been made available. *Murray, supra.*

Private counsel, as ordered, is not provided anywhere in the Kentucky corrections system. In addition, counsel's role is not limited to constitutional law claims or criminal matters but is only limited to a "demonstrated legal need" which could include anything from handling name changes to tax advice or divorce. Non-incarcerated citizens of the United States of America do not have such entitlements. Therefore, as a result of this order, inmates at KCIW have not only more than that provided all male inmates in the

Kentucky system but more than is available to any non-incarcerated citizen of the United States. This far exceeds the principles of federalism and comity which should temper federal equitable relief when constitutional violations occur. The only constitutional violation that was established in this trial was a lack of comparable resources for access to the courts between male and female populations. There was no demonstration of a denial of access to courts.

More importantly, the court did not set a standard by which it intended to judge the effectiveness or the adequacy of private counsel at the conclusion of the trial period. If this order is judged merely as remedy for past inadequate access, it is clearly improper. *Bounds, supra; Wolff, supra; Murray, supra.* It also creates a conflict with at least eight other circuits which the Sixth Circuit recognized in its opinion. These eight circuits including the Sixth Circuit,[13] have ruled access to the courts does not require the hiring of private counsel when other alternatives and resources are made available.[14] All these circuits agree that meaningful

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[13]*Walker* v. *Mintzes, supra; Holt* v. *Pitts, supra.*

[14]*Cepulonis* v. *Fair,* 732 F. 2d 1 (1st Cir. 1984); *Peterkin* v. *Jeffes,* 855 F. 2d 1021 (3rd Cir. 1988); *Harrington* v. *Holshouser,* 741 F. 2d 66 (4th Cir. 1984); *Williams* v. *Leeke,* 584 F. 2d 1336 (4th Cir. 1978), *cert. den'd,* 442 U.S. 911 (1979); *Morrow* v. *Harwell,* 768 F. 2d 619 (5th Cir. 1985); *Cruz* v. *Hauck,* 627 F. 2d 710 (5th Cir. 1980); *Cruz* v. *Hauck,* 762 F. 2d 1230 (5th Cir. 1985); *Campbell* v. *Miller,* 787 F. 2d 217 (7th Cir. 1986), *cert. den'd,* 479 U.S. 1019 (1986); *Kelsey* v. *Minnesota,* 622 F. 2d 956 (8th Cir. 1980); *Sands* v. *Lewis,* 878 F. 2d 1188 (9th Cir. 1988); *Lindquist*

(Footnote Continued on Next Page)

or adequate access to the courts must be measured in terms of whether persons are inhibited or prohibited, as a result of the inadequacies, from filing civil actions or criminal actions. The legal programs or options are judged in terms of the extensiveness of the law library, its availability and any non-professional legal assistance provided, if any (i.e. trained inmate legal aides or paralegals from the community).

All of the circuits including the Sixth Circuit have consistently held when there is a substantive law library available on a reasonable hourly basis with access to either trained inmate legal aides or paralegals, there is no justification or need for the hiring of private counsel to assist inmates. This result is the same even if there are illiterate or non-English speaking inmates at the institution. In no instance have the circuit courts ordered the hiring of private counsel to make up for past inadequacies or past denials of access much less past disparities.

In this instance, the female inmates, at least by 1983, had already been provided the identical legal resources provided male inmates which included trained inmate legal aides. There is no justification for the court's order directing defendants to hire private counsel to assist those same female inmates solely based on a lack of history of self-help. As a result, this order requires defendants to provide females all legal re-

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v. *Idaho State Board of Corrections*, 776 F. 2d 851 (9th Cir. 1985); *Hooks* v. *Wainwright*, 775 F. 2d 1433 (11th Cir. 1985); *Straub* v. *Monge*, 815 F. 2d 1467 (11th Cir. 1987).

source tools available which has not been required by this Court. *Bounds, supra; Wolff, supra; Murray, supra.*

This decision is in direct conflict with the Sixth Circuit's own opinions regarding access to courts. In 1985, the Sixth Circuit ruled that access to courts need only be "reasonable and adequate", and prisoners must be supplied with *some* means of obtaining legal assistance. Such reasonable and adequate access could be in the form of an adequate law library, jailhouse lawyers, *or* outside legal assistance. *Walker* v. *Mintzes, supra.* In that opinion, the Sixth Circuit stated:

> We are concerned with the right of access to the courts not necessarily to a prison law library. There is no claim made here that any particular prisoner was actually impeded in their access to court.

Walker, at 932.

In this case, no claim was made that any inmate was actually impeded in her access to courts. The claim was only that the law library was inadequate and the resources available to females were not comparable to that provided the male inmates. In *Walker,* the Sixth Circuit concluded:

> . . . there exists no showing here that any prisoner has been denied access *to the courts* by the Michigan prisons' rules and regulations. These prisons provide additional assistance to any prisoner who demonstrates a need, and jailhouse lawyers are available. We are unable to conclude under these

> circumstances that all inmates are being denied access within the meaning of *Bounds*.

Walker, at 932.

Similarly, the Sixth Circuit in a per curiam decision stated there was no one single formula which constituted access to courts, recognizing that alternative avenues are just that, alternatives, and that the choice of those alternatives should lie with the state. *Holt* v. *Pitts, supra*. *In Holt*, a prisoner's constitutional right of access to courts could be accomplished as long as the state provided a prisoner with tools necessary to defend himself:

> A prisoner who chooses not to avail himself of the alternatives provided has no basis—constitutional or otherwise for complaint.

Id. at 640-641.

More importantly, there is no formula by which the parties, including the court, can measure the success of this part-time attorney. There are no limits to the assistance provided by counsel to constitutional issues including criminal matters or habeas petitions. Even though concurring, District Judge Surheinrich wrote separately to express his concern with the effect of the affirmative relief imposed by the district court concluding that the remedy seems most likely to result in "further proliferation of baseless suits" rather than achieving the intended effect of providing female inmates with equal and constitutionally necessary access to the courts. (App. 10a.) And certainly Judge Guy,

in his dissent, believed the court had gone beyond any remedies authorized by the facts and evidence presented as well as the law.

Consequently, to allow this opinion to stand creates a substantive conflict with this Court, other circuits and even with the Sixth Circuit regarding access to the courts.

III. The Principles of Federalism and Comity Prohibit Overboard and Intrusive Remedies.

A. This order sets no limits and no standards by which its effectiveness can be reviewed.

While recognizing the federal equity courts' authority to fashion appropriate remedies when constitutional violations are found, the relief granted can be no broader than necessary and must be tempered with principles of federalism and comity. In addition, great deference must be granted prison administrators. *O'Lone, supra; Turner, supra; Hewitt* v. *Helms,* 459 U.S. 460 (1983); *Rhodes* v. *Chapman,* 452 U.S. 337 (1981); *Bell* v. *Wolfish,* 441 U.S. 520 (1979); *Rizzo* v. *Goode,* 423 U.S. 362 (1976); *Procunier* v. *Martinez,* 416 U.S. 396 (1974); *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973). This principle has been consistently applied by the circuit courts as many district court remedial orders have been viewed as too expansive or intrusive.[15]

This limit on the federal equity court has not been followed here. Arguments I and II herein have estab-

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[15] *Ruiz* v. *Estelle,* 679 F. 2d 1115 (5th Cir. 1982); *Hoptowit* v. *Ray,* 682 F. 2d 1237 (9th Cir. 1982); *Newman* v. *Alabama,* 683 F. 2d 1312 (11th Cir. 1982).

lished no basis under the Equal Protection Clause or the Due Process Clause for the entry of such an order. A review of the terms of the order on its face requires a finding of a violation of the principles of federalism and comity. The order set no limit on the assistance of private counsel to civil rights, habeas or criminal matters. This order mandates counsel to assist in *all* demonstrated legal needs. Private citizens have no such entitlements. In addition, no legal need has ever been demonstrated by any plaintiff class member.

More importantly, this remedy has no standards by which the state or any court can determine success. The parties only know a review will be conducted within eighteen months, after the remedy begins. This far exceeds equitable limits and breaches the principles of comity and federalism.

Finally, the Sixth Circuit failed to take into account the good faith history of the defendants which it required in a previous opinion reversing an injunction arising from the 1980 consent decree. *Kendrick* v. *Bland,* 740 F. 2d 432 (6th Cir. 1984). There, the district court had found a pattern and practice of brutality and harassment at KSP and as a result, enjoined specific officers from performing certain functions in the institution. In a reversal, the Sixth Circuit concluded the findings were not clearly erroneous but the remedy was not the least intrusive. The Sixth Circuit determined that the least intrusive remedy in that instance was "particularly compelling because the corrections defendants had exhibited a history of co-

operation and good faith" through the comprehensive consent decree designed to rectify practices and policies and conduct that had been alleged to have been unconstitutional. *Id.* at 439. The Sixth Circuit stated:

> Given this history, it must be assumed that the state will continue to act in good faith to alleviate unconstitutional harassment and to comply with the order enjoining such conduct.

Id. at 439.

In this opinion, defendants were not given that consideration. The record in this case similarly demonstrated a good faith history as was recognized by the district court in its commendation of the warden and her staff and in its subsequent opinions. The record established the law library was expanded prior to trial and additional legal services and resources were expanded immediately after the 1982 order.

The order challenged here cannot be justified under the Equal Protection Clause and the Due Process Clause nor can it be sanctioned under the principles of comity and federalism as the least intrusive remedy.

The remedy directing the hiring of private counsel was in additior to a remedial order requiring the state to provide the female inmates with resources *equal* to those provided the males. That portion of the order challenged here is an extraordinary order and conflicts with this Court's own opinions, those of other circuits and decisions within the Sixth Circuit itself on same or similar issues and should be reversed.

CONCLUSION

The defendants urge this Court to consider the ramifications of this decision and the possible effect on corrections officials not only in this circuit but throughout the country when choosing alternatives to provide meaningful and adequate access to the courts and who must attempt to treat female inmates comparably even though a dramatic difference exists in their numbers.

It is important for this Court to review this decision in order to provide guidance to state prison administrators to resolve the equal protection and access to courts question as well as the limits on remedial orders.

THEREFORE, Petitioner requests that Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

No. 86-6067

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAT CANTERINO, Et Al., - - - *Plaintiffs-Appellees,*

v.

GEORGE WILSON, Et Al., - - *Defendants-Appellants,*
UNITED STATES OF AMERICA, - - - - *Intervenor*

ORDER — Filed June 22, 1989

BEFORE: GUY and BOGGS, Circuit Judges; and SUHRHEINRICH*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Guy adheres to his dissent.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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*Hon. Richard Suhrheinrich sitting by designation from the Eastern District of Michigan

NOT RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24.

No. 86-6067

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAT CANTERINO, a/k/a
PAT WILLIAMS, et al., - - - *Plaintiffs-Appellees,*

v.

UNITED STATES OF AMERICA - - *Plaintiff-Intervenor,*
GEORGE WILSON, et al., - - - *Defendants-Appellants.*

Filed April 10, 1989

BEFORE: GUY and BOGGS, Circuit Judges; and SUHRHEINRICH, District Judge.*

PER CURIAM. This is an appeal from the district court's ruling in this prisoners' class action suit challenging the conditions of confinement at the Kentucky Correctional Institute for Women (KCIW). This appeal focuses on only one aspect of that ruling: the requirement that KCIW hire a part-time attorney on a temporary basis in addition to upgrading the prison's library. The basis for this ruling was the trial judge's determination that the legal facilities and assistance the women had been receiving did not provide them with minimally adequate access to the courts as guaranteed by the Constitution, and that the women's facilities were not substantially equivalent to those provided

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*The Honorable Richard Suhrheinrich, United States District Judge for the Eastern District of Michigan, sitting by designation.

to male inmates in Kentucky. *Canterino* v. *Wilson*, 546 F. Supp. 174, 216 (W. D. Ky. 1982).

In October 1980, female inmates of KCIW filed suit challenging a number of the conditions of their confinement, including the library facilities and lack of legal training and/or assistance. The district judge held a four-week trial, after which he ordered the defendants to update the prison library and provide a half-time attorney for the inmates. The court ordered the parties to brief the issue of access to an attorney and legal materials, after which the court ordered the parties to formulate a plan to provide the female inmates at KCIW meaningful access to the courts. The defendants submitted a plan proposing the hiring of an attorney for 20 hours per week. In July 1982, the district judge ordered that such an attorney be hired.

In his opinion, the district judge found that the women lacked any history of "self-help" in the law. He further found that the library at KCIW was inadequate and that the prison had to upgrade its materials, extend its hours, and, in addition, provide the inmates with a half-time attorney to assist them. The court held that these improvements were necessary to comply with the equal protection clause, as well as to provide the inmates access to the courts. However, it should be noted that no inmate testified that they wanted any legal services that they had not been able to receive. Further, male inmates in Kentucky do not have an attorney assigned to their prisons. On the other hand, the Office of Public Advocacy (OPA) spends 96 hours per week at one male prison and 120 per week at another, while their time spent at the women's prison is limited to two to three hours every three weeks. Further, the male inmate legal aides are trained by experienced peers, whereas the women are given a two-week course, but none of their peers is experienced in handling habeas petitions or civil rights suits.

After the court issued its initial order, the defendants moved for supplemental relief regarding the order requiring that an attorney be hired, arguing that the female inmates now received the same legal services as male inmates in Kentucky. At this point, the library had been updated, and its open hours had been extended to 15 per week. In addition, the number of inmate legal assistants had been increased from one to four. The defendants stressed the fact that the Kentucky Office of Public Advocacy, a state-funded legal services agency, provides assistance with criminal matters and provides an attorney to KCIW for one half-day every three weeks to assist with civil cases. In addition, the defendants claimed that the updated library and inmate legal aides were sufficient to meet the constitutional standard.

The district judge disagreed, and again ordered the parties to provide the inmates with the equivalent of a half-time attorney, reasoning that the law library alone was not sufficient to compensate the women for the lack of a history of self-help which the male inmates had. Subsequently, in September 1986, the defendants filed a motion to amend the earlier orders of the district judge, which motion was denied. The district judge reiterated his earlier finding that the prison library alone, even after being updated, was insufficient to satisfy the right of access to the courts. The court expressly ordered the defendants to hire a half-time attorney for eighteen months to assist and train the female inmates in areas in which they needed assistance. The defendants now appeal.

II

The standard of review in this case demands that we give great deference to the factual findings of the district judge. *Kendrick* v. *Bland,* 740 F. 2d 432, 434 (6th Cir. 1984). Although "[d]eference to prison authorities is

especially appropriate when state penal facilities are involved," *Newman* v. *State of Alabama,* 683 F. 2d 1312, 1320 (11th Cir. 1982), "district courts have broad discretion to fashion remedies once constitutional violations are found." *Hoptowit* v. *Ray,* 682 F. 2d 1237, 1245 (9th Cir. 1982). The standard, then, is one of abuse of discretion. *Id.* at 1246.

III

In *Bounds* v. *Smith,* 430 U. S. 817, 821 (1977), the Supreme Court affirmed the Fourth Circuit's determination that North Carolina's library plan "denied women prisoners the same access rights as men to research facilities." The Court began its analysis by stating that "prisoners have a constitutional right of access to the courts." *Ibid.* The Court then reviewed a number of precedents in which this principle was held to require that indigent prisoners be "allowed to file appeals and habeas corpus petitions without payment of docket fees," *Id.* at 822 (citing *Burns* v. *Ohio,* 360 U. S. 252, 257 (1959)); that trial transcripts be provided to indigent prisoners at no cost, *Ibid.* (citing *Griffin* v. *Illinois,* 351 U.S. 12, 20 (1956)); and that counsel be appointed when necessary to ensure " 'a meaningful appeal.' " *Id.* at 823 (quoting *Douglas v. California,* 372 U. S. 353, 358 (1963)). The Court explained that the guiding principle in these cases is that "States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.' " *Ibid.* (quoting *Ross* v. *Moffitt,* 417 U. S. 600, 616 (1974)). The Court focused on two prior cases, *Johnson* v. *Avery,* 393 U. S. 483 (1969), and *Wolff* v. *McDonnell,* 418 U. S. 539 (1974), both of which held that in the case of illiterate, indigent prisoners without the skills necessary to present their own cases, their " 'constitutional right to help' " could be satisfied by securing the aid of other, more skilled inmates. *Bounds,* 430 U. S. at 823-24 (quoting *Johnson,* 393 U. S. at 502 (White, J., dissenting)).

However, the Court noted that neither case had ruled out the possibility that further measures would be necessary to provide truly meaningful access to the courts to inmates. *Id.* at 824. Thus, the Court held

> that the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Id. at 828.

In the present case, the prison officials argue that the above holding supports their position that prisoners must be provided with either a library or legal assistance, but not both. However, in *Bounds* itself, the Court discussed a number of alternatives to providing an adequate law library, stating that although "a legal access program need not include any particular element . . . [a]ny plan . . . must be evaluated as a whole to ascertain its compliance with constitutional standards." *Id.* at 832. In other words, the appellants are correct that it is not always necessary to provide both a library and legal assistance; however, they are incorrect in their assertion that a court *may not* require such a combination of elements. In fact, in *Bounds*, despite the availability of "jailhouse lawyers, the Court found that an adequate library "or other forms of legal assistance" were necessary to provide constitutionally adequate access to the courts. *Id.* at 825. Thus, the existence of a law library, however adequate, does not *per se* eliminate the necessity for further measures to protect the right of access to the courts.

We are aware that other courts have found that, in particular situations, both a library and legal assistance were not necessary. In *Kelsey* v. *State of Minnesota*, 622 F. 2d 956, 958 (8th Cir. 1980), the Eighth Circuit found that a

particular prisoner's legal needs were met by existing facilities. However, that court also stated that every program "must be evaluated on its own to establish, first, what the prisoners' needs for legal assistance are and, second, whether those needs are being met." *Ibid.* (citations omitted).

In *Cepulonis* v. *Fair,* 732 F. 2d 1, 5-6 (1st Cir. 1984), the First Circuit held that it was error for the district court to have ordered *both* the creation of a satellite library *and* the creation of a law student assistance program. In *Campbell* v. *Miller,* 787 F. 2d 217, 227-28 (7th Cir. 1986), the Seventh Circuit held that restricted access to library facilities for maximum security inmates did not deprive the inmates of meaningful access to the courts. The court relied heavily on the Ninth Circuit's opinion in *Lindquist* v. *Idaho State Board of Corrections,* 776 F. 2d 851, 858 (9th Cir. 1985), in which that court stated that "[t]he fact that an inmate must wait for a turn to use the library does not necessarily mean that he has been denied meaningful access to the courts." The *Lindquist* court held that a prison's adequate library *plus* well-trained inmate law clerks were sufficient to meet constitutional standards and, thus, appointed counsel was not necessary. *Id.* at 856. A similar result was reached in *Hooks* v. *Wainwright,* 775 F. 2d 1433, 1438 (11th Cir. 1985), where the Eleventh Circuit held that the Constitution does not require appointment of counsel for inmates who were challenging the conditions of their confinement.

On the other hand, in *Morrow* v. *Harwell,* 768 F. 2d 619, 623 (5th Cir. 1985), the Fifth Circuit held that a bookmobile check-out system *plus* law student assistance did *not* meet constitutional standards. The court stated that, "[i]n the absence of some sort of direct legal assistance, . . ., the inmates must be given access to a library. . . ." *Ibid.* Further, in *Wade* v. *Kane,* 448 F. Supp. 678, 685 (E.D. Pa.

1978), *aff'd*, 591 F. 2d 1338 (3d Cir. 1979) (mem.), the district court held that law student assistance did not compensate for the inadequacy of the prison's law library, and that the closing of the prison's Law Clinic coupled with the library's inadequacy amounted to a constitutional violation.

This court has held, in the past, that when a prisoner is afforded assistance of counsel, and law books were available to the inmate, no constitutional violation had occurred. *Holt* v. *Pitts*, 702 F. 2d 639, 640-41 (6th Cir. 1983). Further, in *Glover* v. *Johnson*, 478 F. Supp. 1077, 1096 (E.D. Mich. 1979), *aff'd sub nom Cornish* v. *Johnson*, 774 F. 2d 1161 (6th Cir. 1985) (mem.), this court affirmed the district court's decision holding that the law library at the women's prison was adequate even though it was smaller than the library available to male inmates. However, the district court further stated that "the provision of satisfactory law library does not settle this issue." *Ibid.* The court thus went on to reject the contention, also made here by the prison officials, that either a library or legal assistance is required, but not both, stating that this was an unduly narrow reading of *Bounds*. *Ibid.* Thus, the court required that legal assistance and training was necessary to satisfy the women inmates' right of access to the courts. *Id.* at 1097.

The cases in other jurisdictions which appear to conflict with our decision here are distinguishable from this case for one important reason: none involved a finding by the district court that there was an equal protection violation in that women inmates had less satisfactory access to the courts than male inmates. *Kelsey*, 622 F. 2d 956 (8th Cir. 1980); *Cepulonis*, 732 F. 2d 1 (1st Cir. 1984); *Campbell*, 787 F. 2d 217 (7th Cir. 1986); *Lindquist*, 776 F. 2d 851 (9th Cir. 1985); *Hooks*, 775 F. 2d 1433 (11th Cir. 1985). That distinction is significant. The fourteenth amendment "requires, even in the context of prison conditions, that any

such disparity [between the treatment of male and female inmates] must 'serve important governmental objectives' and must be 'substantially related to achievement of those objectives.'" *Bukhari* v. *Hutto*, 487 F. Supp. 1162, 1171 (E.D. Va. 1980) (quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)). Further, "the cost of protecting a constitutional right cannot justify its total denial." *Bounds*, 430 U.S. at 825.

Here, the district judge found as fact that there was a disparity between male and female inmates' access to the courts. The judge further determined that, to cure that disparity, women inmates needed legal assistance and training on a part-time, temporary basis. The district judge ordered only that this plan be implemented on a trial basis, for only eighteen months. The prison officials do not argue that this disparity serves an "important governmental objective." They argue only that the district judge abused his discretion in basing his finding of a disparity on the women inmates' lack of a history of self-help. However, the district court in *Glover*, as affirmed by this court, based its holding that women inmates required legal assistance on its finding that male inmates had the benefit of "experienced writ writers" among them while women inmates "have not yet developed this expertise. . . ." 478 F. Supp. at 1097. We did not find error in the use of this reasoning in *Glover*, nor do we find error here.

On the whole, then, we find no reason to afford the district judge here any less deference than was afforded the district judge in *Kendrick* v. *Bland*, 740 F. 2d 432, 434 (6th Cir. 1984). Where, as in *Kendrick* and the instant case, the district court has had "extended involvement and intimate understanding of the facts and issues joined in this action," that judge's determinations must be given great deference. *Ibid.* Here, the district judge's extremely detailed and carefully drafted opinion, 546 F. Supp. 174

(W.D. Ky. 1982), evinces his "extended involvement and intimate understanding" of the issues, both legal and factual, involved in this case. We find no basis for distributing his findings and conclusions. Thus, we AFFIRM.

SUHRHEINRICH, District Judge, concurring,

I am in substantial agreement with Judge Bogg's opinion but write separately to emphasize my feelings on the affirmative relief imposed by the district court. During the past four years, I have witnessed an ever-expanding volume of meritless cases generated by prisoners, many prisoners having apparently made a hobby of writ-writing. The affirmative relief ordered by the district court seems most likely to result in a further proliferation of baseless suits, rather than achieving the intended effect of providing female inmates with equal and constitutionally necessary access to the courts. However, our review here is limited to a determination of whether the district court abused its discretion in fashioning the instant remedy. Under these facts, I cannot find that the district court abused its discretion. Accordingly, I concur.

GUY, Circuit Judge, dissenting.

The district court found that the provision of attorney assistance at KWIC was essential "to establish equality of access among the female and male inmate populations." *Canterino* v. *Wilson*, 644 F. Supp. 738, 741 (W.D. Ky. 1986). Plaintiffs argue on appeal, and the court below agreed, that female inmates have been denied equal protection of the laws because "[h]istorically, women inmates have not gained the experience of their male counterparts in providing legal assistance to other inmates as 'writ-writers' or 'jailhouse lawyers' because of the unavailability for many years of sufficient legal resources." *Canterino* v. *Wilson*, 562 F. Supp. 106, 112 (W.D. Ky. 1983). As additional support for its finding of an equal protection violation, the district court noted that:

> "KSP [Kentucky men's maximum security prison] has three full-time [OPA] attorneys serving around 900 inmates," or one attorney hour per about seven inmates per week. "KSR [Kentucky men's medium security prison] has two full-time attorneys and one part-time, serving 1500 inmates a total of 96 attorney hours per week," or about one attorney hour per fifteen inmates per week. There are about 150 women inmates incarcerated at KCIW. The state offered no basis for providing the women at KCIW with only one attorney hour per 150 inmates per week.

562 F. Supp. at 111 (citations omitted).

As I understand the court's rationale, it found that the women inmates had been denied meaningful access because they had not been provided with the *same* access as the male inmates. This rationale does not withstand scrutiny. Initially, in order to establish an equal protection violation, plaintiffs must show that the state *intentionally discriminated* against women prisoners as a group for no legitimate reason. It is undisputed that, prior to the consent decree entered in the men's prison case in 1981, the law libraries at both KSR and KSP were also "woefully inadequate." Therefore, at most, the male inmates enjoyed the benefit of a constitutionally adequate library for two years longer than female inmates at KCIW. Furthermore, as the court pointed out, in 1982, the Kentucky prison system housed a minimum of 2400 male prisoners and only 150 female inmates. Undoubtedly it is an historical fact that, due to the extremely disproportionate number of male inmates, the men have, by virtue of longer and more varied experience, acquired a greater level of expertise in meeting their own legal needs. I glean from this fact no evidence of any intentional discrimination against women as a class by the state. Indeed, it appears that the OPA, which is charged

by statute with providing legal assistance to inmates in criminal matters only, regulates its own hours and is not subject to the complete direction of the prison authorities in its choice of the number of hours of legal assistance to provide at any one facility.

Plaintiffs attempt to justify the court's "affirmative sex-conscious relief" under the rationale of the Supreme Court's holding in *Local 28 Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 106 S. Ct. 3019 (1986), in which the Court approved the use of race-conscious affirmative relief without requiring that only identifiable victims of past discrimination be benefited. That case is inapposite for two reasons.

First, courts faced with evidence of intentional race or sex discrimination fashion relief in this area under the statutory directive of Title VII and the longstanding and consistent federal policy to eradicate such discrimination in the *employment* context. Second, the Court found the race-conscious remedy appropriate in that case explicitly because the union's discriminatory practices were partially longstanding and egregious. 478 U.S. at 476; 106 S. Ct. at 3050.

In contrast, this case presents no issue of pervasive discrimination nor any justification for imposing an "affirmative" remedy for past recalcitrance. Our sole question here is whether the state is required, under the fourteenth amendment's equal protection clause, to assist female inmates in achieving the *identical* level of access as is enjoyed by male inmates, even though male inmates' access may be characterized as "more meaningful" than is constitutionally required. I would answer that question in the negative and reverse.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

UNITED STATES OF AMERICA - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

MEMORANDUM — Filed September 18, 1986

This case is before the court on defendants' motion to alter or amend this court's July 26, 1982 and February 10, 1983 orders concerning the access to the courts issue.

Plaintiffs, inmates at the Kentucky Correctional Institution for Women (KCIW), instituted this action in 1981 for relief concerning conditions of their confinement, disparate treatment of men and women incarcerated in Kentucky prisons, and denial of vocational training and educational opportunities. This motion is limited to the issue of access to the courts.

After a four-week trial, this court held that substantial disparity existed between legal resources available to females at KCIW and those provided to male inmates under § 8 of the Consent Decree in *Kendrick* v. *Bland*, 541 F. Supp. 21 (W.D. Ky. 1981). *Canterino* v. *Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982). Specifically, this court found that females at KCIW only recently were provided mini-

mal access to adequate legal resources, and also lacked any history of self-help in the legal field. Therefore, this court ordered defendants to suuply KCIW law labrary facilities equivalent to those provided to male prisoners at Kentucky State Reformatory (KSR) and Kentucky State Penitentiary (KSP), substantially increase the amount of non-program time the library is open, and provide the equivalent of a half-time attorney to assist inmates in all areas of demonstrated need. The court held these minimal steps necessary to comply with the equal protection clause and with *Bounds* v. *Smith,* 97 S. Ct. 1491 (1977). 546 F. Supp. at 216.

Following that decision, defendants moved for supplemental relief with respect to the court's attorney assistance requirement for the female inmates. *Canterino* v. *Wilson,* 562 F. Supp. 106 (W.D. Ky. 1983). In reiterating its earlier decision, this court noted that defendants failed to meet their burden of showing that legal needs of prisoners were served by the existing programs, and ordered defendants to formulate a plan which "must in some way provide for identification of either paid or volunteer attorneys or paralegal advisors within the meaning of *Bounds*. . . ." 562 F. Supp. at 112.

This court also noted that although the law library was complying with earlier established standards as a source of legal information, (*Canterino,* 546 F. Supp. at 216), the physical conditions of and access to the library were inadequate. In addition, this court found that the training provided to inmate legal aides was insufficient because it was limited to legal research and did not teach the type of research and writing skills necessary to prepare legal briefs in civil matters. *Canterino,* 562 F. Supp. at 110.

In conclusion, this court again noted that its decision was based on the disparity of access provided to female and male inmates:

> Historically, women inmates have not gained the experience of their male counterparts in providing legal assistance to other inmates as "writ-writers" or "jailhouse lawyers" because of the unavailability for many years of sufficient legal resources. . . . The actions pending before this Court reflect the absence of effective inmate writ-writers at KCIW in comparison to the State's male institutions. . . . The services of an attorney is justified, not because there is or is not a similar program offered at the men's prisons, but because, unlike the male population generally, the women do not have a history of self-help in the legal field; the evidence tends to show that until recently they have had little access to adequate legal resources.

562 F. Supp. at 112.

Defendants now state that they will not implement the attorney assistance program voluntarily, but only upon order of the court. Although this court construes its decision in 1983 as such an order, it has reviewed the renewed arguments of both sides with respect to this matter. Defendants argue that a half-time attorney will "do the work for the inmates and not take on the role of a teacher," and propose, instead, an expansion of the Office of Public Advocacy legal training program. Defendants also cite two recent court decisions as construing *Bounds* in support of their position, *Lindquist* v. *Idaho State Board of Corrections,* 776 F. 2d 851 (9th Cir. 1985), and *Hooks* v. *Wainwright*, 775 F. 2d 1433 (11th Cir. 1985).

In *Lindquist,* the court held that *Bounds* does not require a state to provide inmates with both access to a competent law library and legal assistance. The court noted that several experienced writ-writers were present within the Idaho prison system, and that the system provided videotape training courses for inmate law clerks. 776 F. 2d

at 856-7. Similarly, in *Hooks*, the court reversed a Florida district court which ordered that state's prison system to provide legal services, after noting the inadequacies of the law library system. The appellate court stated that district courts which interpret *Bounds* as mandating legal assistance are in error, and that if inmates are not constitutionally entitled to the assistance of counsel in 41 U.S.C. § 1983 cases [*see Hardwick* v. *Ault*, 517 F. 2d 295, 298 (5th Cir. 1975)], no rational basis exists on which to mandate counsel for prisoners considering, filing or pursuing such claims. 775 F. 2d at 1498. [In support of denial of a motion for rehearing *en banc*, the court stated that the earlier opinion was an interlocutory appeal on the legal assistance issue alone, and that no decision had been made concerning the adequacy of the law library. Two dissenting judges stated that the earlier opinion misinterpreted *Bounds* and failed to recognize that its issue was more narrow, given the alleged law library inadequacies. *Hooks* v. *Wainwright*, 781 F. 2d 1550, 1551 (11th Cir. 1986)] This court agreed with the dissenting judges, and declines to follow the above cases for reasons which follow.

In *Bounds*, the Supreme Court reaffirmed the existence of a constitutional right to meaningful access to the courts, which requires states to provide inmates with adequate law libraries or adequate assistance from legally-trained persons. 97 S. Ct. at 1498. In so holding, the court noted that although some states have established a combination of both, a legal access program does not require any of the particular elements named, but rather, must be evaluated as a whole to ascertain compliance with constitutional standards. 97 S. Ct. at 1499-1500. An remand, the district court later held that, absent proof of an adequate law library or inmate paralegal training program, the state was required to submit a plan for providing some form of legal

assistance . *Smith* v. *Bounds*, 610 F. Supp. 597, 606 (D.C. N.C. 1985).

This court finds its earlier decisions consistent with *Bounds* and distinguishable from *Lindquist* and *Hooks*. In ordering the state to provide a plan for inmate legal assistance, this court relied, not only on *Bounds*, but on the Fourteenth Amendment equal protection guarantee. Thus, this court held that in order to provide meaningful access to the courts to the female inmates at KCIW, the state should provide the same opportunities accorded to male inmates at the other prisons. In order to provide equal opportunities in this situation, inmate legal assistance is necessary, since the past unavailability of legal resources has prevented females from gaining legal assistance experience comparable to that of the male writ-writers.

This decision is consistent with *Bounds*, in that this court has determined that the existing law library facilities alone are not sufficient to provide meaningful access. Although the state's substitute proposal of additional legal training — such as that found in *Lindquist* — is a workable idea for the future, that proposal alone is insufficient to establish equality of access among the female and male inmate populations.

Plaintiffs propose that a half-time attorney be hired on a short-term basis (ie: 18 months) in order to evaluate the program's effectiveness. This court agrees with this proposal and further suggests, in order to alleviate defendants' concerns, that the program include inmate training and assistance.

An appropriate order shall accompany this memorandum.

Dated: 9-15-86

(s) Edward H. Johnstone
Edward H. Johnstone, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

UNITED STATES OF AMERICA - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - *Defendants.*

ORDER

In accordance with the memorandum opinion this date entered,

IT IS ORDERED:

1. Defendants' motions to alter and amend this court's earlier decisions rendered July 26, 1982 and February 10, 1983 are DENIED;

2. In accordance with those opinions, defendants shall hire a half-time attorney for an initial eighteen-month period to assist and train the female inmates in all areas of demonstrated legal need.

Dated: 9-15-86

(s) Edward H. Johnstone
Edward H. Johnstone, Chief Judge
United States District Court

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - *Plaintiffs,*

v.

GEORGE WILSON, et al., - - - - *Defendants.*

February 14, 1983.

MEMORANDUM OPINION

JOHNSTONE, District Judge.

This matter is before the Court on Defendant Kentucky Department of Correction's post-trial motion for supplemental relief from this Court's Order entered on July 26, 1982. A four week bench trial was held and judgment rendered in favor of the plaintiff-class, women inmates at the Kentucky Correctional Institution for Women (KCIW). *Canterino, et al.* v. *Wilson, et al.*, 546 F. Supp. 175 (W.D. Ky. 1982).

At a compliance conference conducted by the Court to settle the litigants' differences on October 13, 1982, two contested issues remained unresolved. First, whether administrators of KCIW must provide attorney-assistance for criminal and civil matters in order to meet their constitutional duty to assure that all inmates incarcerated at KCIW are provided meaningful access to the courts. Second, whether administrators of KCIW, have created a constitutionally protected liberty interest in favor of the

inmates requiring that a corrections officer may only issue an incident report if he or she personally witnesses an alleged institutional rule infraction. The Court requested the parties submit post-trial memoranda indicating their reliance on trial testimony and the applicable law on these two issues. Because of the length of the trial proceedings, a complete transcript is not available at this writing. However, having thoroughly reviewed the evidence, the memoranda of counsel, and the applicable law, the Court makes the following findings and conclusions.

I. ACCESS TO THE COURTS

Paragraph five of the Court's Order entered July 26, 1982, provides that, in addition to improvements required for the institution's law library:

> Defendants [Kentucky Department of Corrections] shall make the services of an attorney available to inmates at KCIW on a part-time basis for at least twenty hours per week.

Defendants' memorandum sets forth the position that the inmates at KCIW have the same legal services as do all Kentucky male inmates in the system. They also state that the Kentucky Office of Public Advocacy (OPA) provides assistance with criminal matters for all Kentucky inmates and that OPA's current practice of providing one attorney to KCIW for one half day every three weeks is adequate to meet the needs of the women. As for civil matters, defendants suggest that the inmates' needs are satisfied by the services provided by inmate legal aides and the institution's recently upgraded law library.

Plaintiffs counter that the defendants have a constitutional duty to provide all KCIW inmates with meaningful access to the courts, which in this case, requires the state to

provide attorney-assistance to the inmates in addition to the law library.

This Court's Memorandum Opinion, *Canterino* v. *Wilson,* 546 F. Supp. at 216, imposing upon the defendants the duty to provide ". . . the equivalent of at least one half-time attorney, who will assist inmates in all areas, including habeas corpus and other civil matters, in which they have a demonstrated need. . . ." found such assistance ". . . required by both the equal protection clause and the decision of the Supreme Court in *Bounds* v. *Smith,* 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977)."

At trial, this Court found the KCIW law library "woefully inadequate" when the lawsuit was initiated. *Canterino* v. *Wilson,* 546 F. Supp. at 203. However, since the filing of this action, defendants are commended for their significant efforts to improve the resources of the KCIW law library. In addition, the availability of the library has been extended to fifteen hours on non-program time per week, the minimum imposed by this Court's Order, July 26, 1982.

Supplementing the law library, the Court found that "[o]ne attorney from the Kentucky Office for Public Advocacy visits KCIW for a half day every three weeks to assist inmates with criminal appeals. This attorney does not assist in civil matters or prison disciplinary proceedings, although most legal problems at KCIW concern civil matters, such as child custody. (Jarvis Testimony)." *Canterino* v. *Wilson,* 546 F. Supp. at 203.

The United States Supreme Court recognized "[i]t is now established beyond doubt that prisoners have a constitutional right to access to the courts," *Bounds* v. *Smith,* 420 U. S. 817, 821, 97 S. Ct. 1491, 1494, 52 L. Ed. 2d 72 (1977), and that the burden is upon the states to ensure that the right of access remains unfettered. 430 U. S. at 829, 97 S. Ct. at 1498. To meet the constitutional requirement, the right to access must be "meaningful." 430 U. S. at 823, 97

S. Ct. at 1495. " 'Meaningful access' to the courts is the touchstone." *Id.* Under *Bounds,* the right of meaningful access extends to the preparation and filing of actions challenging the fact of a prisoner's confinement as well as to actions challenging the legality of his conditions of confinement. 430 U. S. at 827, 97 S. Ct. at 1497; *see Johnson* v. *Avery,* 393 U. S. 483, 89 S. Ct. 747, 21 L. Ed. 2d 718 (1969) (habeas corpus); *Wolff* v. *McDonnell,* 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974) (civil rights).

In *Bounds,* the Court emphasized that while law libraries were one constitutionally acceptable method to assure meaningful access to the courts, other methods were not foreclosed:

> Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students, either as volunteers or in formal, clinical programs, the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time consulant basis, and the use of full-time staff attorneys, working either in new prison legal assistance organizations or as part of public defender or legal services offices. . . . Independent legal advisors can mediate or resolve administratively many prisoner complaints that would otherwise burden the courts, and can convince inmates that other grievances against the prison or the legal system are ill-founded, thereby facilitating rehabilitation by assuring the inmate that he has not been treated unfairly. . . . Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.

430 U. S. at 831-832, 97 S. Ct. at 1499-1500.

Recognizing this right to access to the courts, the question before us is what type of plan is sufficient under the

factual record developed in this action to ensure meaningful access to the courts on behalf of inmates at KCIW. The defendants contend that the KCIW law library, as supplemented by inmate law clerks and assistance of the once a month visit of the OPA attorney for criminal appeals, is sufficient. This Court disagrees.

While other courts have held that law libraries are sufficient in and of themselves to protect the meaningful access to the courts, the factual record in this case indicates a law library available to some of the inmates only fifteen hours a week under the supervision of inexperienced inmate legal aides is insufficient to provide the inmates with the rights extended to them by the Constitution. These limitations imposed on the use of the library are compounded by the library's physical conditions. The testimony at trial showed that the library has insufficient space, lighting, and study areas, was too noisy, and compared unfavorably to the facility at the men's institution. [Inmate Legal Aide Carol Jarvis Testimony]. The physical deficiencies impede an inmate's ability to use the law library. There are no tables available for research. [Carol Jarvis Testimony]. Generally, protective custody and other inmates in the Cell Block cannot go to the law library. Legal aides must bring books to their cells and each inmate is limited to four law books per day, four days per week. [Testimony of Warden Betty Kassulke, Associate Warden Gail Chandler, and Carol Jarvis]. Some books, such as the *Kentucky Revised Statutes* and the *Criminal Law of Kentucky* may not be taken to the Cell Block. [Carol Jarvis Testimony].

These inmates are forced to rely upon a system whereby they must request specific legal materials from their cells. Such a system is wholly inadequate to ensure meaningful access to the courts. *Williams* v. *Leeke*, 584 F. 2d 1336, 1339 (4th Cir. 1978); *Accord*, *Cruz* v. *Hauck*, 627 F. 2d 710, 720-

721 (5th Cir. 1980); *Hooks* v. *Wainwright*, 536 F. Supp. 1330, 1341 (M. D. Fla. 1982). Unless the library adequately provides access to the courts for *all* inmates, some other assistance should be available for the initiation of habeas corpus and civil rights actions.

Exacerbating this situation is the fact that many inmates at KCIW are illiterate or otherwise unable to do effective legal research. Plaintiffs' Exhibit 5 imports that 69% of the KCIW population had less than a high school education, with half of the total population having completed only the eighth, ninth or tenth grades. This is corroborated by Table II of Plaintiffs' Exhibit 6 and Defendants' Exhibit 103.

Even if unlimited physical access could be provided to the law library, it would be unavailing to one who lacks sufficient opportunity or intellectual ability to utilize the facility. The facts indicate that this is the case at KCIW.

The unrebutted trial testimony shows that the inmate legal aides at KCIW cannot effectively perform the function of a legal assistant, as that term was used in *Bounds* v. *Smith*, 430 U. S. at 831, 97 S. Ct. at 1499. No comprehensive paralegal training is given, only a training course limited to legal research. [Carol Jarvis Testimony]. However, that course did not attempt to teach the sort of research and writing skills necessary to prepare legal briefs. The emphasis of the training was on criminal cases, with only films used to train inmates on civil matters. No continuing legal education seminars are conducted after the initial training. Since the attorney from OPA handles criminal appeals only and does not monitor the cases filed by the legal aides, it appears that the OPA attorney's narrow scope of representation and supervision, plus the clerks' lack of serious training in civil matters, do not qualify the inmate law clerks as "paralegal assistants . . . work[ing]

under lawyers' supervision." *Bounds* v. *Smith*, 430 U. S. at 831, 97 S. Ct. at 1499.

As defendants point out, the OPA attorney's services are limited by statute to provide only for "the representation of indigent persons accused of crimes or mental states which may result in their incarceration or confinement." K.R.S. 31.010. The November, 1982, affidavit of David Norat, OPA attorney servicing KCIW, provides that he does not ". . . undertake representation of inmates in civil actions other than in petitions for writs of habeas corpus and other civil cases directly relating to the challenge of a criminal conviction or a sentence." While OPA may be prohibited by statute from assisting the inmates at KCIW on legal matters such as civil rights actions, the OPA is not the only source of attorney-assistance available to the defendants to provide counsel for these inmates.

Even this limited access to the OPA attorney afforded the KCIW inmate is less than that afforded to similarly situated male inmates in the Kentucky Prison System. The proof at trial indicated a denial of equal protection. We found, in our Memorandum Opinion of July 26, 1982, "KSP [Kentucky men's maximum security prison] has three full-time attorneys serving around 900 inmates," or one attorney hour per about seven inmates per week. *Canterino* v. *Wilson*, 546 F. Supp. at 203. "KSR [Kentucky men's medium security prison] has two full-time attorneys and one part-time, serving 1500 inmates a total of 96 attorney hours per week," or about one attorney hour per fifteen inmates per week. *Id.* There are about 150 women inmates incarcerated at KCIW. The state offered no basis for providing the women at KCIW with only one attorney hour per 150 inmates per week. The state has failed to show how such a disparity in access to the courts is justified. *Glover* v. *Johnson*, 478 F. Supp. 1075, 1079 (E. D. Mich. 1979).

As recognized in *Bounds*, acceptable legal services programs may very widely in their format. But to a greater or lesser degree, dependent upon the circumstances of a particular prison setting, it has been held that all permissible programs must affirmatively include at least three aspects to meet the *Bounds* standard. First, some source of legal information of a professional nature must be available to all inmates for the full legal development of their claims. This may consist of an adequate law library available to all inmates or qualified attorneys in sufficient number, or some combination of both. Secondly, for those inmates who possess insufficient intellectual or educational abilities to permit reasonable comprehension of their legal claims, provision must be made to allow them to communicate with someone who, after consultation with the legal learning source, is capable of translating their complaints into an understandable presentation. Such a presentation does not have to be refined, but it must be reasonable, straightforward, and an intelligible statement. This goal may be accomplished for the unlearned inmate through an institutional attorney, a free-world person with paralegal training, or an inmate, who through experience and intelligence, is a competent "writ-writer." Where these sources of assistance are present, and no physical or coercive restraints to prisoner complaints exist, due process mandating access to the courts is met.

Against this standard we measure the existing KCIW system.

Regarding a source of legal information, we find that the KCIW law library is now or is currently in the process of meeting the standards set out in this Court's Order entered July 26, 1982. However, the provision of a satisfactory law library does not settle the issue. As it is recognized in this Circuit, ". . . . Defendants' position that they are obligated only to provide *either* an adequate law

library *or* qualified legal assistance is too narrow a reading of *Bounds*. [Judge Feikens's emphasis]" *Glover* v. *Johnson*, 478 F. Supp. 1075, 1096 (E. D. Mich. 1979).

Faced with a similar issue in considering the constitutionality of conditions at the women's correctional facility in Michigan, Judge Feikens noted in *Glover* v. *Johnson* that "[t]he adequacy of a prisoner's rights to access to the courts must be measured by the actual opportunity he or she has to raise a valid and meaningful claim before the courts." The United States Supreme Court recognized in *Wolff* v. *McDonnell*, 418 U. S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), that the Due Process Clause assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights. "The recognition by the Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts." *Id.* at 579, 94 S. Ct. at 2986.

It does not necessarily follow that the presence of a few inexperienced inmate legal aides at KCIW fulfill the constitutionally necessary translator to provide the metamorphosis for an inmate's *pro se* complaint into an understandable legal presentation. Historically, women inmates have not gained the experience of their male counterparts in providing legal assistance to other inmates as "writ-writers" or "jailhouse lawyers" because of the unavailability for many years of sufficient legal resources. *Glover v. Johnson*, 478 F. Supp. at 1097. As noted at the time of the filing of this action, the KCIW law library was "woefully inadequate." *Canterino* v. *Wilson*, 546 F. Supp. at 203. The actions pending before this Court reflect the absence of effective inmate writ-writers at KCIW in comparison to the State's male institutions.

Defendants cannot reject the responsibility impressed upon them by the Constitution that they shall ". . . assist inmates in the preparation and filing of meaningful legal papers. . . .," *Bounds* v. *Smith,* 430 U. S. at 823, 97 S.Ct. at 1495, on the grounds that men do not share the same opportunity. The services of an attorney is justified, not because there is or is not a similar program offered at the men's prisons, but because, unlike the male population generally, the women do not have a history of self-help in the legal field; the evidence tends to show that until recently they have had little access to adequate legal resources. At trial, defendants elicited no evidence substantiating the adequacy of its legal assistance program and did not carry its burden of demonstrating that the legal needs of the prison population are served by the existent program. Until the goal of meaningful access is reached, the defendants are charged with the responsibility of formulating a plan, compatible with security objectives, which will ensure that inmates needing assistance will have access to competent assistance.

Since trained inmate writ-writers are not available, such a plan, of course, must in some way provide for identification of either paid or volunteer attorneys or paralegal advisors within the meaning of *Bounds,* and it must also create a method whereby the inmate-plaintiff and advisor can meet together.

Based upon this Court's findings of fact at trial, the Court concludes that the program in effect at the time of trial as modified to date for providing KCIW inmates with legal assistance, taken together, does not provide a "constitutionally acceptable method to assure meaningful access to the courts." *Bounds* v. *Smith,* 430 U.S. at 830, 97 S. Ct. at 1499. We adopt the language of the Court's Memorandum Opinion and Order entered July 26, 1982, where it provides:

> To bring access to courts to constitutional parity, defendants must 1) supply a library equivalent to those required for males at KSP and KSR, 2) substantially increase the amount of non-program time the library is open, and 3) provide the equivalent of at least one half-time attorney, who will assist inmates in all areas, including habeas corpus and other civil matters, in which they have a demonstrated need.

Canterino v. *Wilson*, 546 F. Supp. at 216. Finding nothing indicating defendants are not in compliance with the first two elements of the Court's mandate, we leave to the parties the task of formulating the precise details within today's guidelines to accomplish the third element necessary to afford inmates at KCIW their fundamental constitutional right to meaningful access to the courts.

II. INCIDENT REPORTS

Paragraph four of the Court's Order in this action provides:

> Defendants are directed to distribute to each inmate brought before the Adjustment Committee a document explaining in plain language the inmate's minimum due process rights which are embodied in defendants' Internal Management Directives. This document shall be served on inmates at least twenty-four hours prior to their Adjustment Committee hearing.

Defendants, by their Motion for Supplemental Relief, dated September 17, 1982, sought to avoid this requirement contending it creates a "substantial burden" and is "unnecessary and not required by law or the Consent Decree or the Internal Management Directives."

On the other hand, plaintiffs respond that such a document is essential to ensure that each residents' due process rights are protected.

At a conference conducted by the Court on October 13, 1982, the parties agreed that, except for one contested provision, the plaintiffs' tendered document: "Inmate Rights—KCIW Disciplinary Procedures," Exhibit "A" to Plaintiffs' Response to Defendants' Notice of Compliance, should be adopted in its entirety to meet the requirement of paragraph four of the Order. The contested subsection provides:

> § I.B. A CO [corrections officer] may *only* issue a write-up if he or she personally witnessed the incident.

This Court, in its Memorandum Opinion, interpreted Internal Management Directive (IMD) 713.03(D)(1) as requiring incident reports to include only facts personally witnessed by the reporting corrections officer. *Canterino* v. *Wilson*, 546 F. Supp. 174, 202 (W.D. Ky. 1982). IMD 713.03(D)(1), Exhibit PX-22, specifically limits the issuance of incident reports to ". . . only those facts which the reporting employee has personally witnessed *and* otherwise verified. . . ." [emphasis added]. The Court concluded this directive governed the issuance of all incident reports on the trial testimony of Gary Dennis, Executive Director of the Office of Corrections Training. [Defendants attached the partially transcribed portion of his trial testimony as Exhibit 1 to their post-trial memorandum]. At page 4 of Exhibit 1, Mr. Dennis testified:

> We go over with them [corrections officers] the Incident Report. We talk with them about the importance of report writing and the fact that they are only to report what they see. They are not to deal with hearsay.

From the trial testimony, this appears to be a blanket requirement limiting the discretion of all corrections personnel, except in the case of an "extraordinary occurrence."

Mr. Dennis, at page 5 of Exhibit 1, explained the difference between an "incident report" and an "extraordinary occurrence report."

> We talk about two different kinds of reports. We have an *incident report* which is an Adjustment Committee action. We teach the employees to fill that out if there [is] an infraction of the code of conduct or the rules or regulations. There is another incident report called or sometimes referred to [as] an *extraordinary occurrence report* which is filled out. These are quite different. The incident report, that is where we teach our line staff members you report only what you see. Then that is turned over to the next [line] of supervision which is probably [a] lieutenant for investigation.
>
> . . . . . .
>
> So we teach our line correctional officers, the new employees, your responsibility is [to] report only what you see, write in that report factual information and then that report is passed up to the next level of supervision and they will undertake the investigation. That is in an instance where there is [a] violation of the code of conduct. [emphasis added].

Even in a situation where an inmate might repeatedly say or do something disruptive, yet no staff member personally witnesses the act, Mr. Dennis explained at page 6-7 of Exhibit 1:

> . . . we teach them they are not to take action on hearsay. That they charge an inmate with an offense that they have first hand knowledge of. They are not to take another inmate's testimony or another inmate's word that "X" called him an SOB.

Gary Dennis went on to explain, at page 6 of Exhibit 1, that in a situation where no officer witnesses a serious incident, such as "cutting" incident.

> . . . we would instruct our officer there to do an *extraordinary occurrence report.* Which means at this particular point in time you are not charging any inmate with an offense under the offense and penalty code. All you are doing is describing what is an extraordinary occurrence. Whether it is a cutting or a fire or something that would bear investigation.
>
> .....
>
> We would teach them to write a full description of the incident of what they saw. I want to make a clear distinction that in that case they are not charging an inmate with a violation. All they are doing is reporting the circumstances of that event. [emphasis added].

Thus, the policy governing the write-ups of an extraordinary occurrence report, where there is a serious offense and a full investigation vertifying the event, even in the absence of a corrections officer personally witnessing the event, provides for charges to be brought against an inmate, not on the basis of the incident report alone, but upon the staffs' thorough investigation and the recommendation of an adminstrative officer. As KCIW Warden Betty Kassulke testified, extraordinary occurrence reports issue for fires, escapes, serious injuries, accidents, and similar incidents. Plaintiffs agree with this dichotomy distinguishing incident reports and extraordinary occurrence reports.

It is recognized in this Circuit that state policy limiting prison officials' discretion creates an enforceable liberty interest. *Bills* v. *Henderson*, 631 F. 2d 1287 (6th Cir. 1980); *Walker* v. *Hughes*, 558 F. 2d 1247 (6th Cir. 1977). In addressing the issue of an inmate transfer into segre-

gation, the Sixth Circuit stated that a "[l]iberty interest can be created by state rules or mutually explicit understandings as well as the statute." *Bills* v. *Henderson*, 631 F. 2d at 1291.

In this action, the record reflects that the Kentucky Department of Corrections, through IMD 713.03(D)(1), Exhibit PX-22, has created such a liberty interest as set out above. The testimony of Gary Dennis confirms that this policy is applicable to all corrections officers.

As noted, it has been the state's policy that *all incident reports* shall issue *only* where a corrections officer personally witnesses the incident. In the case of an *extraordinary occurrence*, such as an escape, murder, extortion, fire, or similar serious violation of institutional rules or law, the Department indicates that, regardless of whether there is a staff witness, a full investigation shall be conducted verifying, documenting, and substantiating the incident, and upon the recommendation of administrative personnel, specific charges identifying the alleged infraction shall be brought against an inmate in the form of an "extraordinary occurrence report." The Court recognizes that the Administrators of the Kentucky Corrections Department must be allowed to issue charges of serious institutional infractions based on a thorough investigation since they cannot operate and maintain security otherwise. However, as to violations of prison conduct code, the Department requires all write-ups to be personally witnessed by a corrections officer. The defendants have offered no trial testimony or exhibits to the contrary.

On the basis of the record, exhibits, and trial testimony, the Court finds that the existing policy of the Department of Corrections might be better stated as follows:

> Where there is a violation of the prison code of conduct, a corrections officer may *only* issue an *incident*

report if he or she personally witnessed the incident pursuant to IMD 713.03(D)(1);

However, in the event of a serious inmate infraction (*e.g.*, murder, fire, extortion, escape) a corrections officer need not personally witness the incident, but only upon a thorough staff investigation verifying, documenting, and substantiating the acts or events involved in such an infraction, charges *may be brought* upon the recommendation of an administrative officer in the form of an *extraordinary occurrence report.*

The Department of Corrections current policy reflects an attitude of professionalism by the administrators and staff in their attempt to maintain the delicate balance between institutional security and fairness to the inmate charged with a rule infraction.

An appropriate order is this day entered.

ORDER

For the reasons stated in the Memorandum Opinion this day entered,

IT IS ORDERED:

1. The parties shall submit a plan formulating the precise details to assure inmates at KCIW their fundamental constitutional right to meaningful access to the courts. Supplementing the changes previously mandated by this Court's Order of July 26, 1982, enlarging the KCIW law library and expanding its availability, this plan shall specifically provide for identification of either paid or volunteer attorneys or paralegal advisors within the meaning of *Bounds* v. *Smith*, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed 2d 72 (1977), who will assist inmates in all areas, including criminal actions, habeas corpus and other civil matters, in which the inmates have a demonstrated need. By neces-

sity, this plan will incorporate the available services afforded by the Kentucky Office of Public Advocacy, but will not be limited to that agency in fulfilling the state's constitutional responsibility. The plan must also create a method whereby the inmate plaintiff and advisor can meet together. Within the guidelines set out in the Memorandum Opinion, we leave to the parties the task of formulating the precise details of the plan.

The plan shall be submitted within sixty days of this Order.

2. As agreed and modified by the parties at a conference conducted by the Court on October 13, 1982, plaintiffs' tendered due process document: "Inmates Rights — KCIW Disciplinary Procedures," Exhibit "A" to Plaintiffs' Response to Defendants' Notice of Compliance, shall be adopted in its entirety. However, while § I.B., as tendered, adequately addresses defendant's policy for verification and issuance of an "incident report," it does not address its policy for verification and issuance of an "extraordinary occurrence report" and the parties may supplement the wording of that section to clarify any ambiguity created by that omission.

As agreed by the parties, the due process document shall be incorporated verbatim into the new KCIW resident handbook for distribution to all inmates. However, until the information can be incorporated in the handbook, the document shall be given to the charged inmate at least 24 hours prior to the Adjustment Committee hearing.

This requirement shall become effective as soon as possible, or no later than ten days from the entry of this Order.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

UNITED STATES OF AMERICA - - *Plaintiff-Intervenor,*

v.

GEORGE W. WILSON, et al., - - - - - *Defendants.*

MEMORANDUM OPINION—July 26, 1982

This action is before the Court for judgment following a four week trial, submission of post-trial briefs and oral arguments. Plaintiffs are inmates at the Kentucky Correctional Institution for Women (KCIW). They seek a broad range of relief concerning the conditions of their confinement, disparate treatment of men and women inmates in Kentucky's prisons, and the denial of opportunities for vocational training and education. This action was filed on October 31, 1980 and a class was certified on December 22, 1980 pursuant to Rule 23(a), (b)(1) and (b)(2) of the Federal Rules of Civil Procedure for purposes of declaratory and injunctive relief. Defendants are officials of the Kentucky Department of Corrections with responsibility for operating KCIW.

Plaintiffs' complaint was amended for the second time by motion made December 23, 1981 and sustained February 22, 1982. The second amended complaint joined the Super-

intendent of Public Instruction as a defendant, alleging the Department of Education operates vocational education programs for the Department of Corrections in a manner which discriminates against women in violation of Title IX of the Education Amendments of 1972 and Title II of the Vocational Education Amendments of 1976. The Court severed the claims against the Department of Education on April 6, 1982, pending trial of the claims against the Department of Corrections.

The United States Department of Justice filed a complaint in intervention on March 11, 1982, alleging discrimination against female inmates in the Kentucky prison system in violation of the equal protection clause of the fourteenth amendment and 20 U.S.C. 1681.[1] This action is properly maintained as a class action and jurisdiction is proper under 28 U.S.C. §§1341, 1343, 1345 and 42 U.S.C. §2000h-2. Venue is proper under 28 U.S.C. §§1391 and 1392.

KCIW is a multi-custody prison located on a compound of 276 acres, seven of which are fenced and contain the main institutional buildings. One building, opened in 1938, contains the dormitories, cafeteria, kitchen, infirmary, academic school, institutional offices, admissions and orientation unit, canteen, laundry, special management unit (cellblock), and law library (PX 55, DX 8). An annex to this building, constructed more recently, houses the vocational education program. In addition to the main building, KCIW has an honor cottage, a chapel, a recreation building called the "Barn", and a minimum security unit known as "staff house."

The institution was designed to house a maximum of 110 inmates. Its population reached a modern high of 145 in 1976, at which time the state opened a new minimum security institution in northern Kentucky for women to relieve overcrowding at KCIW. That minimum security

facility, the Daniel Boone Career Development Center (DBCDC), which usually housed around thirty women, (DX 22, p. 5), was closed in September, 1981 for budgetary reasons.[2] The prisoners at DBCDC were all transferred back to KCIW. Thus KCIW houses all minimum, medium and maximum security female offenders in Kenutcky.

Most inmates at KCIW (63%) are between 18 and 30 years old. The median education level is tenth grade. About two-thirds of the inmates come from broken homes and almost three-quarters were responsible for at least one dependent child before incarceration. All but a handful were the sole or primary support for at least one dependent. A large majority (74%) of KCIW inmates were being incarcerated for the first time. Property crimes of theft, fraud and forgery comprise nearly half or all convictions. Murder and manslaughter are the next most frequent crimes, followed by drug related offenses. (*See* Peachee, "A Description of Female Offenders at KCIW," PX 5).

KCIW has operated since 1977 under a Levels System in which all institutional privileges are allocated on the basis of behavior and seniority. This system is all encompassing and is at the heart of plaintiffs' allegations of sex-based disparities in conditions of confinement.

The court has divided the case into three main parts: the Levels System, vocational education and training, and general conditions of confinement. Issues concerning the classification procedures used at KCIW overlap into each of these areas, but some aspects of the classification system wil be addressed separately.

Although the findings and conclusions which follow dictate that substantial changes must be made at KCIW, this should not be taken as an adverse reflection on Superintendent Kassulke, Associate Superintendent Chandler or the other highly committed staff people at the institution. Officials at KCIW, contrary to the case in so many condi-

tions of confinement lawsuits, have exhibited great dedication to their jobs and genuine concern for the welfare of the inmates in their charge. The Court respects the efforts of these officials in a difficult job.

I. FINDINGS OF FACT

(Findings in their entirety are not included—only those findings which relate to this petition are reprinted)

5. *Access To Courts*

The law library at KCIW was woefully inadequate when this lawsuit was initiated. The Supreme Court Reporter had not been updated in over six years; of the nearly 400 Federal Reporters published since 1960, only 22 were in the KCIW law library; over one-third of the Kentucky Decisions from the Southwest Reporter, Second Series, were missing; there were no Shepard's Citations. (*See* Teitlebaum Testimony, PX 204). Since the initiation of this suit, defendants have made a significant effort to improve the holdings of the KCIW law library. (Joint Exhibit 1). The collection still does not include many basic books which must be provided at KSR and KSP under the Consent Decree in *Kendrick* and *Thompson*. (PX 4, § 8).

The law library is open to inmates from 12:30 p.m. until 3:15 p.m., Tuesday through Friday. Since these hours largely overlap with the afternoon program hours and work shift, the library is available only a few minutes each day unless an inmate gets permission to miss class or work. (Testimony of Carol Jarvis, and Elizabeth Chandler, Assoc. Supt.).

One attorney from the Kentucky Office for Public Advocacy visits KCIW for a half day every three weeks to assist inmates with criminal appeals. This attorney does not assist in civil matters or prison disciplinary proceedings, although most legal problems at KCIW concern civil

matters, such as child custody. (Jarvis Testimony). KSP has three full-time attorneys serving around 900 inmates. (Parke Testimony). KSR has two full-time attorneys and one part-time, serving 1500 inmates a total of 96 attorney hours per week. (Teitlebaum Testimony). (*See also,* PX 4, Consent Decree § 3).

(Relevant Portions of Conclusions of Law)

5. *Access to Courts*

As noted in the findings of fact, defendants have made substantial progress in bringing their law library into compliance with minimum standards. Here again, however, there is still a substantial disparity between the resources available to women inmates and those provided for males under § 8 of the *Kendrick* and *Thompson* Consent Decree. To bring access to courts to Constitutional parity, defendants must 1) supply a library equivalent to those required for males at KSP and KSR, 2) substantially increase the amount of non-program time the library is open, and 3) provide the equivalent of at least one-half-time attorney, who will assist inmates in all areas, including habeas corpus and other civil matters, in which they have a demonstrated need. These minimal steps are required by both the equal protection clause and the decision of the Supreme Court in *Bounds* v. *Smith,* 430 U.S. 817, 97 S. Ct. 1491, __ L. Ed. 2d __ (1977).

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

UNITED STATES OF AMERICA, - - *Plaintiff Intervenor,*

v.

GEORGE W. WILSON, et al., - - - - *Defendants.*

ORDER—July 26, 1982

For the reasons stated in the Memorandum Opinion entered this day,

IT IS ORDERED AND ADJUDGED:

1. Defendants shall have a period not to exceed ninety days in which to revise their policies on institutional privileges in a manner that will ensure female inmates are afforded the same normal institutional privileges as male inmates. Thereafter, defendants are permanently enjoined from operating and enforcing the Incentive Levels System, 5th revision, entered into evidence as plaintiffs' Exhibit 122.

2. On or before October 15, 1982, defendants shall submit a plan for improving the opportunities for female inmates in the areas of vocational education, on the job training, prison industries and community release programs in a manner consistent with the findings of fact and conclusions of law entered this day. Plaintiffs and the United

States shall file their objections to defendants' plan by November 15, 1982. The Court will then set a date for the parties to meet and confer in an effort to resolve any differences which may exist, and will thereafter hold a hearing on any objections which cannot be resolved.

3. Defendants shall take steps to reduce overcrowding in the Admissions and Orientation Unit and to eliminate the practice of housing inmates classified to Admissions and Orientation in the infirmary as soon as possible. No later than November 1, 1982, defendants shall submit to the Court their plan for bringing housing at KCIW into compliance with the American Correctional Association standards currently enforced in the male institutions. Plaintiffs shall have thirty days after the submission of this report to file their objections and the Court will schedule a hearing on any objections which cannot be resolved by agreement.

4. Defendants are directed to distribute to each inmate brought before the Adjustment Committee a document explaining in plain language the inmate's minimum due process rights which are embodied in defendants' Internal Management Directives. This document shall be served on inmates at least twenty-four hours prior to their Adjustment Committee hearing.

5. Defendants shall make the following materials available in the KCIW law library:

Federal Materials

1. West's Supreme Court Reports, or Lawyer's Edition, 1960 and forward
2. Federal Second Reporter, 1960 and forward
3. Federal Supplement Reports, 1960 and forward
4. United States Code Annotated, West Publishing Company:
   (a) Index volumes

(b) Constitution of the United States volumes

(c) Title 18 volumes

(d) Title 28 volumes

(e) Title 42 volumes

5. Federal Practice Digest, Second Series
6. Paperback edition—Federal Rules of Civil Procedure, Evidence, Appellate Procedure and Title 28, West Publishing Company
7. Paperback edition—Federal Rules of Criminal Procedure, Evidence, Appellate Procedure and Title 18, West Publishing Company
8. Shepard's United States Citations
9. Shepard's Federal Second and Federal Supplement Citations

Kentucky Materials

1. Kentucky Revised Statutes
2. Kentucky Digest, West Publishing Company
3. Southwestern Report, 2d Series, Kentucky cases, entire series, for the years preceding the publication of S.W.2d, either Southwestern Reporter of the official reports of the Kentucky Court of Appeals
4. Shepard's Kentucky or Southwestern Reporter Citations

Miscellaneous Publications

1. Corpus Juris Secundum:

   (a) Habeas Corpus volumes

   (b) Appeal and Error volumes

   (c) Constitutional Law volumes
2. Black's Law Dictionary
3. Cohen, *Legal Research in Nutshell*

4. Criminal Law Reporter
5. Israel, *Criminal Procedure in a Nutshell*
6. Murrell, *Kentucky Criminal Law*
7. Sokol, *Federal Habeas Corpus*
8. Prison Law Monitor
9. Wright, *Federal Courts*
10. Potts, *Prisoners Self-Help Litigation Manual*
11. ACLU Handbook, *The Rights of Prisoners*
12. Bronstein, Hirschkop, *Prisoners' Rights*, 1979

The materials listed in this paragraph shall be kept up to date according to publishers revisions. Defendants are further directed to keep the law library at KCIW open and staffed during at least fifteen (15) hours of non-program time per week. Defendants shall make the services of attorney available to inmates at KCIW on a part-time basis for at least twenty hours per week.

6. Defendants shall take steps immediately to open the yard for female inmates at KCIW an amount of time substantially equivalent to the hours in which the yard is open to male inmates at KSR and KSP.

7. Defendants shall make available to all female inmates necessary items for personal hygiene at no charge in a manner equivalent to their provisions for male inmates in this area.

8. Defendants are enjoined from enforcing their interpretation of K.R.S. 197.140 in a manner which operates as a blanket prohibition against all minimum security activities, and are directed to submit to the Court a revision of the applicable Internal Management Directives in accordance with the Court's findings and conclusions on this issue.

9. Defendants shall institute a default provision in their grievance procedure for women at KCIW similarly

situated to men at KSP and KSR, requiring favorable action on grievances not acted upon within the prescribed time limits.

10. This Court will retain jurisdiction until it is satisfied that the terms of the memorandum opinion and order in this action have been complied with in all respects.

Dated: July 26, 1982

(s) Edward H. Johnstone
Edward H. Johnstone
Judge, United States District Court

Supreme Court, U.S.
FILED
OCT 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-464

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GEORGE W. WILSON, et al. - - - - - Petitioners

versus

PAT CANTERINO, a/k/a PAT WILLIAMS, et al. - - - - - Respondents

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTION PRESENTED

The question presented by this case is whether a federal district court, having found that prison officials deprived women inmates of meaningful access to the courts, and having found that prison officials deprived women inmates of access comparable to that of men inmates, has the discretion to fashion a remedy which includes the temporary provision of a half-time attorney to assist women inmates in their civil and criminal law needs.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES ..... iii–iv

COUNTERSTATEMENT OF THE CASE 1– 5

REASONS FOR DENYING THE WRIT 6–15

I. The Case Does Not Conflict With Any Decision of This Court, The Sixth Circuit or Any Other Circuit. 6–13

A. The Decision Does Not Conflict With Prior Supreme Court Decisions. 7–11

B. The Decision Does Not Conflict With Prior Sixth Circuit Decisions 11–12

C. The Decision Does Not Conflict With Decisions of Other Circuits. 12–13

II. The Decision Below is Narrow and Limited Solely to This Record. 13–15

CONCLUSION 16

APPENDIX

Plaintiffs' Post-Trial Memorandum on Access to the Courts, Appendices A-H 1a–17a

TABLE OF AUTHORITIES

	PAGE
Bounds v. *Smith*, 430 U.S. 817 (1977)	3, 6, 7, 9, 11, 12, 15
Campbell v. *Miller*, 787 F. 2d 217 (7th Cir. 1986), *cert. den'd*, 479 U.S. 1019 (1986)	6
Canterino v. *Wilson*, 546 F. Supp. 174 (W.D. Ky. 1982)	2, 3
Canterino v. *Wilson*, 562 F. Supp. 105 (W.D. Ky. 1983)	5, 8, 10, 14
Canterino v. *Wilson*, 644 F. Supp. 738 (W.D. Ky. 1986)	3, 5
Cepulonis v. *Fair*, 732 F. 2d 1 (1st Cir. 1984)	6
City of Cleburne, Tex. v. *Cleburne Living Center*, 473 U.S. 432 (1985)	14
Craig v. *Boren*, 429 U.S. 190 (1976)	14
Cruz v. *Hauck*, 627 F. 2d 710 (5th Cir. 1980)	6
Cruz v. *Hauck*, 762 F. 2d 1230 (5th Cir. 1985)	6
Glover v. *Johnson*, 478 F. Supp. 1075 (E.D. Mich. 1979), *aff'd sub nom Cornish* v. *Johnson*, 774 F. 2d 1161 (6th Cir. 1985)	11
Harrington v. *Holshouser*, 741 F. 2d 66 (4th Cir. 1984)	6
Holt v. *Pitts*, 702 F. 2d 639 (5th Cir. 1983)	6, 11
Hooks v. *Wainwright*, 775 F. 2d 1433 (11th Cir. 1985)	6
Kelsey v. *Minnesota*, 622 F. 2d 956 (8th Cir. 1980)	6, 13
Lindquist v. *Idaho State Board of Corrections*, 776 F. 2d 851 (9th Cir. 1985)	6
Mississippi University for Women v. *Hogan*, 458 U.S. 718 (1982)	14
Morrow v. *Harwell*, 768 F. 2d 619 (5th Cir. 1985)	6
Murray v. *Giarratano*, 109 S.Ct. 2765 (1989)	6, 10
Personnel Adm'r of Massachusetts v. *Feeney*, 442 U.S. 256 (1979)	14
Peterkin v. *Jeffes*, 855 F. 2d 1021 (3rd Cir. 1988)	6, 10
Sands v. *Lewis*, 878 F. 2d 1188 (9th Cir. 1988)	6
Straub v. *Monge*, 815 F. 2d 1467 (11th Cir. 1987)	6

PAGE

Walker v. *Mintzes*, 771 F. 2d 920 (6th Cir. 1985) 6, 11

Walters v. *Thompson*, 615 F. Supp. 330 (N.D. Ill. 1985) 10

Williams v. *Leeke*, 584 F. 2d 1336 (4th Cir. 1978), *cert. den'd*, 442 U.S. 911 (1979) 6

Wolff v. *McDonnell*, 418 U.S. 539 (1974) 6, 8, 9, 10

No. 89-464

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

GEORGE W. WILSON, et al. - - - - - *Petitioners*

v.

PAT CANTERINO, a/k/a
PAT WILLIAMS, et al. - - - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The respondents, Pat Canterino, a/k/a Pat Williams, Susie M. Bland, Tina Stone, Wanda Hicks, Joan Starks, Cecilia A. Gonzalez, Betty Holder, and Shirley LaCourse, as representatives of the class of inmates incarcerated at the Kentucky Correctional Institution for Women, respectfully oppose issuance of a writ of certiorari for the reasons contained in this brief.

COUNTERSTATEMENT OF THE CASE

The petitioners' (Corrections) statement of procedural history is essentially accurate and will not be repeated here. The respondents (the inmates) write only to highlight factors weighing against issuance of the writ.

This is a comprehensive prison conditions class action on behalf of women prisoners at the Kentucky

Correctional Institution for Women (KCIW). After a four-week trial in April and May 1982, the district court issued a memorandum opinion and order granting injunctive and declaratory relief in many areas, including access to the courts. *Canterino* v. *Wilson,* 546 F. Supp. 174 (W.D. Ky. 1982).

The district court found that the KCIW law library had been "woefully inadequate"[1] and that the library was generally open only during program hours, thus depriving many inmates of its use. Although Corrections made improvements prior to trial, the KCIW library "still [did] not include many basic books which must be provided" for men, and was open much less often than libraries at Kentucky's men's prisons.[2] *Id.* at 203. Male prisoners were also afforded ten to thirty times the access to attorneys than were women prisoners.[3] *Ibid.* The district court concluded that these

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[1]The court found that at the time the case was filed, the Supreme Court Reporter had not been updated in over six years, the library contained only 22 of the more than 400 Federal Reporters published since 1960, and that the library contained no Shepard's Citations. 546 F. Supp. at 203.

[2]Trial testimony revealed that the men's law library was open for prisoner use seven hours per day, four days per week. R. 328: Trial Transcript, Vol. 7, p. 1495. By contrast, the KCIW law library was open to inmates only from 12:30 to 3:15 p.m., Tuesday through Friday. Since these hours coincided with afternoon work shifts and program hours, inmates had virtually no access to the library unless they obtained permission to miss class or work. R. 328: Trial Transcript, Vol. 1, p. 242; *Canterino,* 546 F. Supp. at 203.

[3]Attorneys from the Office (now Department) of Public Advocacy (OPA) spent 96 hours per week at one men's prison, an

(Footnote Continued on Next Page)

inadequacies denied meaningful access to the courts, as required by *Bounds* v. *Smith*, 430 U.S. 817 (1977), and found that the disparate treatment of male and female prisoners violated the equal protection clause of the Fourteenth Amendment. *Canterino*, 546 F. Supp. at 216.

To cure these constitutional deficiencies, the district court ordered Corrections to supply a law library comparable to those for men, to substantially increase the library's operating hours and to provide the equivalent of one half-time attorney (i.e., twenty attorney hours per week) to assist women prisoners "in all areas, including habeas corpus and other civil matters, in which they have a demonstrated need." *Ibid.*[4]

Corrections did not pursue an appeal of the district court's findings or legal conclusions. It merely sought relief from one aspect of the court's remedial order —

(Footnote Continued From Preceding Page)

average of one attorney hour per fifteen inmates. They spent 120 hours per week at the other men's prison, an average of one attorney hour per five inmates. Attorneys visited KCIW for two to three hours once every three weeks, a weekly average of one attorney hour per 150 inmates. *Canterino*, 546 F. Supp. at 203; R. 328: Trial Transcript, Vol. 7, pp. 1493-94.

[4]Contrary to Corrections' assertion, see Petition for a Writ of Certiorari (Petition), at 3, the court did not initially order Corrections to "hire a half-time attorney". Corrections was merely required to *provide* attorney services, whether through OPA, volunteers or other means. Only when Corrections refused to submit any alternative plan did the court order Corrections to hire an attorney. See *Canterino*, 644 F. Supp. 738, 739-40 (W.D. Ky. 1986).

attorney hiring — and appealed denial of relief as an abuse of the district court's discretion.[5]

The district court denied relief from its injunction. *Canterino,* 562 F. Supp. 105 (W.D. Ky. 1983). In so doing, the court made clear that temporary attorney hiring was intended to remedy both equal protection violations and the lack of meaningful access to the courts. The district court held that, as a result of Corrections' conduct, women inmates lacked a history of self-help through jailhouse lawyers and writwriters. Thus, males had access to inmate legal aides capable — in part through their frequent exposure to attorneys — of providing assistance in a wide range of civil litigation, including state and federal habeus corpus and civil rights actions. Women legal aides — in part through their lack of exposure to attorneys — had no experience in federal or appellate practice, had handled no habeus corpus proceedings and had little experience outside of family law. See R. 439: Plaintiffs' Post-Trial Memorandum on Access to the Courts, Appendices A - H (reproduced in the appendix at 1a-17a). These experienced male legal aides could train their peers and successors in ways unavailable to inexperienced women.

The district court concluded that this massive disparity could not be eliminated solely through providing

[5]Corrections' failure to preserve any argument beyond its abuse of discretion challenge to one aspect of the district court's remedial order precludes it from asserting those arguments here. Corrections has failed to preserve the second and third questions it seeks to present. See Petition, at (i).

comparable law library facilities, hours and contents. *Canterino,* 562 F. Supp. 105, 112 (W.D. Ky. 1983). Women inmates could only be "brought up to speed" by providing them short-term access to an attorney.[6] The court left to the parties the task of formulating the precise details for implementing its order. *Ibid.* After repeated briefing — and after Corrections' consistent failure to submit an adequate plan[7] — the district court finally ordered Corrections to hire one half-time attorney for eighteen months. *Canterino* v. *Wilson,* 644 F. Supp. 738 (W.D. Ky. 1986).

The order was affirmed by a divided panel of the United States Court of Appeals for the Sixth Circuit, which held that, on this record, the district court did not abuse its discretion in fashioning relief. The Sixth Circuit denied rehearing en banc.

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[6]Corrections asserts that the mere provision of an attorney is affirmative sex-conscious relief. Since men received ten to thirty times the access to attorneys than did women, see n. 3, the part-time attorney requirement is merely compensatory. The only "affirmative" component of the remedy is that compelling attorney assistance in civil matters. This component is designed to ensure that women inmates have comparable access to the courts (through law books, library facilities and *trained, experienced inmate paralegals*) as do similarly situated men.

[7]Corrections' intransigence is fully reflected in the record. See R. 273: Defendants' Plan for Access to the Courts; R. 279: Plaintiffs' Response to Plan for Access to the Courts; R. 283: Order; R. 439: Plaintiffs' Post-Trial Memorandum on Access to the Courts; R. 517: Plaintiffs' Supplemental Memorandum; R. 519: Defendants' Supplemental Memorandum; R. 543: Supplement to Defendants' Supplemental Memorandum; R. 544: Plaintiffs' Response to Supplemental Memorandum; R. 546: Defendants' Reply Memorandum.

REASONS FOR DENYING THE WRIT

I. The Case Does Not Conflict With Any Decision of This Court, the Sixth Circuit or Any Other Circuit.

Corrections argues that the Sixth Circuit's decision conflicts with three decisions of this Court,[8] two decisions of the Sixth Circuit[9] and decisions of eight other circuits.[10] See Petition, at 19-25.

The alleged conflict is illusory; indeed, not even the dissenting opinion below suggests that a conflict exists and Corrections' identical argument failed to garner a single vote for rehearing en banc. Corrections does not — for it cannot — specify the supposed conflict, nor does it explain why the dissent found none. Corrections simply misreads these cases, which are consistent with one another and with the decision below.

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[8] *Murray* v. *Giarratano*, 109 S. Ct. 2765 (1989); *Bounds* v. *Smith*, 430 U.S. 817 (1977); and *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

[9] *Walker* v. *Mintzes*, 771 F. 2d 920 (6th Cir. 1985); and *Holt* v. *Pitts*, 702 F. 2d 639 (6th Cir. 1983).

[10] *Cepulonis* v. *Fair*, 732 F. 2d 1 (1st Cir. 1984); *Peterkin* v. *Jeffes*, 855 F. 2d 1021 (3rd Cir. 1988); *Harrington* v. *Holshouser*, 741 F. 2d 66 (4th Cir. 1984); *Williams* v. *Leeke*, 584 F. 2d 1336 (4th Cir. 1978), *cert. den'd*, 442 U.S. 911 (1979); *Morrow* v. *Harwell*, 768 F. 2d 619 (5th Cir. 1985); *Cruz* v. *Hauck*, 627 F. 2d 710 (5th Cir. 1980); *Cruz* v. *Hauck*, 762 F. 2d 1230 (5th Cir. 1985); *Campbell* v. *Miller*, 787 F. 2d 217 (7th Cir. 1986), *cert. den'd*, 479 U.S. 1019 (1986); *Kelsey* v. *Minnesota*, 622 F. 2d 956 (8th Cir. 1980); *Sands* v. *Lewis*, 878 F. 2d 1188 (9th Cir. 1988); *Lindquist* v. *Idaho State Board of Corrections*, 776 F. 2d 851 (9th Cir. 1985); *Hooks* v. *Wainwright*, 775 F. 2d 1433 (11th Cir. 1985); *Straub* v. *Monge*, 815 F. 2d 1467 (11th Cir. 1987).

A. The Decision Does Not Conflict With Prior Supreme Court Decisions.

This Court has recognized that it "is now established beyond doubt that prisoners have a constitutional right to access to the courts." *Bounds* v. *Smith,* 430 U.S. 817, 821 (1977).

In *Bounds,* the Court emphasized that there are several acceptable methods for ensuring meaningful access and that the adequacy of compliance can only be ascertained by reviewing the system as a whole:

> Among the alternatives are the training of inmates as paralegal assistants to work under lawyers' supervision, the use of paraprofessionals and law students . . . the organization of volunteer attorneys through bar associations or other groups, the hiring of lawyers on a part-time basis, and the use of full-time staff attorneys, . . . *Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards.*

430 U.S. at 831-832 (emphasis added).

Corrections asserts that the decision below is inconsistent with *Bounds* because meaningful access to the courts can be provided in a number of ways and "deference must be given state officials to experiment with different options." Petition, at 19.

The Sixth Circuit *acknowledged* that prison authorities are to be given broad deference, but also stated that district courts have broad remedial discretion once constitutional violations have been found. Slip Op., at 4. Here, Corrections has not challenged the dis-

trict court's finding of constitutional violations, nor has it challenged the remedy of increased law library contents and hours. Moreover, during the four years between the district court's initial opinion, 546 F. Supp. 174, and its ultimate remedial order, 644 F. Supp. 738, prison officials offered no alternative remedy to the court.[11] Having chosen to abstain from the remedial process, Corrections cannot now be heard to complain about a lack of deference.

Wolff v. *McDonnell,* 418 U.S. 539 (1974), is similarly consistent with the opinion here. In *Wolff,* this Court held that the due process clause assures that no inmate will be denied the opportunity to present to the judiciary claims of constitutional violations. "The recognition by the Court that prisoners have certain constitutional rights which can be protected by civil rights actions would be diluted if inmates, often 'totally or functionally illiterate,' were unable to articulate their complaints to the courts." *Id.* at 579.

Here, the record reflects that a large segment of KCIW's population is similarly unable to articulate complaints to the courts. More than two-thirds of the population had less than a high school education. Half of the population completed no more than the eighth, ninth or tenth grade. *Canterino* v. *Wilson,* 562 F. Supp. at 110.

Corrections argues that the panel opinion is inconsistent with *Wolff* because here "the record [did not] establish that a need for any legal assistance was not

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[11]See n. 7.

being met . . ." Petition, at 20. This argument misstates the record and misconstrues *Wolff*.

Unrebutted affidavits showed that male legal aides had gained expertise in a wide range of civil litigation, including habeas corpus and civil rights. Their female counterparts had no federal or appellate experience, and handled little but family law. R. 439: Plaintiffs' Post Trial Memorandum on Access to the Courts, Appendices A-H (1a-17a). Besides, an inmate who lacks access to legal materials and the advice of an attorney will not know whether she has a cognizable claim, nor will she know the means to present one. As the Third Circuit recently held:

> Legal assistance . . . whether in the form of an accessible and adequate law library, court-appointed or other attorneys or para-professionals, or some combination of legal resources . . . is central, not peripheral, to the right of access to the courts that *Bounds* protects. We believe that in cases . . . directly involving prisoners' access to legal knowledge, an actual injury necessarily occurs by virtue of a prison's failure to provide the level of assistance required under *Bounds*. [In cases] alleg[ing] the inadequacy of "law libraries or alternative sources of legal knowledge," . . . the analysis of whether an actual constitutional injury exists is simply the *Bounds* analysis. This reading of our actual injury requirement is supported . . . by *Bounds* itself, where the Court's sole inquiry was whether the legal assistance provided was sufficient to afford prisoners meaningful access to the courts.

Peterkin v. *Jeffes,* 855 F. 2d 1021, 1041-42 (3rd Cir. 1988) (citations and footnote omitted). *Accord, Walters* v. *Thompson,* 615 F. Supp. 330, 338 (N.D. Ill. 1985).

The district court found that the improved KCIW law library did not assure meaningful access for all inmates. Physical deficiencies still impeded an inmate's ability to use the library. The library had insufficient space, lighting and study areas, was too noisy and had no tables available for research. It was supervised solely by inexperienced inmate legal aides. *Canterino,* 562 F. Supp. at 110. Men's access to attorneys remained ten to thirty times greater than women's. 546 F. Supp. at 203. Inmates in protective custody or in the cell block could not even use the library. They were limited to four books per day, four days per week, in their cells, and were barred from access to core statute and criminal law books. 562 F. Supp. at 110. *Wolff* thus *supports* the Sixth Circuit's conclusion that, *on this record,* the district court did not abuse its discretion.

Nor is *Murray* inconsistent with this case. There, this Court held that death-row inmates were not constitutionally entitled to appointed counsel in post conviction proceedings. The Court noted, however, that a limited remedy might be appropriate if "adequate and timely access" was not available to inmates. The district court here found, and the record supports, that access for women inmates is still not adequate and is substantially inferior to that for men inmates. The district court's limited remedy of a temporary part-

time attorney is supported by the Court's unchallenged factual findings.

B. The Decision Does Not Conflict With Prior Sixth Circuit Decisions.

The Sixth Circuit cases relied on by Corrections are similary compatible with the decision below. Moreover, in *Glover* v. *Johnson,* 478 F. Supp. 1075, 1096 (E.D. Mich. 1979), *aff'd sub nom Cornish* v. *Johnson,* 774 F. 2d 1161 (6th Cir. 1985) (mem.), the Sixth Circuit rejected the fundamental contention of Corrections here—that *Bounds* requires officials to furnish a law library or legal assistance, but never both.

> . . . Defendants' position that they are obligated only to provide *either* an adequate law library *or* qualified legal assistance is too narrow a reading of *Bounds.* An adequate law library cannot provide meaningful aid to a prisoner unschooled in the most basic techniques of legal research. As a result, courts have recognized the need for the assistance of others who possess these skills in order to render the inmate's right to access effective.

478 F. Supp. at 1096 (emphasis in original). The Court thus required that legal assistance and training be provided to assure women inmates' right of access to the courts. *Id.* at 1097.

In *Holt* v. *Pitts,* 702 F. 2d 639, 640-41 (6th Cir. 1983), the court held that a prisoner, who had been afforded assistance of counsel *and* had law books available to him, had not been denied meaningful access. It in no way argues against the relief granted here.

Finally, in *Walker* v. *Mintzes,* 771 F. 2d 920, 931-2 (6th Cir. 1985), the Court held that limitations on library hours—imposed after a prison right—did not per se violate *Bounds.* The court remanded the case "for the district court to consider whether adequate access to court has been denied . . ." *Id.* at 932.

Like the other cases cited by Corrections, *Walker* is consistent with the opinion below, which recognized that, under *Bounds,* "a legal access program . . . must be evaluated *as a whole* to ascertain its compliance with constitutional standards." Slip Op., at 5, quoting *Bounds,* 430 U.S. at 832 (emphasis added).

The cases relied on by Corrections conflict with the decision below only if it—and the district court order it affirmed—is read to *mandate* law libraries *and* attorney assistance in all cases. Neither the circuit court, nor the district court, nor the respondents assert such a broad and erroneous proposition. To the contrary, this decision holds only that in an appropriate case, a district court has the discretion to require the short-term provision of attorney assistance. The dissent disagrees with the remedy, but not even it argues that the majority opinion conflicts with Supreme of Circuit Court decisions.

C. The Decision Does Not Conflict With Decisions of Other Circuits.

Corrections claims that the decision below conflicts with decisions from eight other circuits, but confines its analysis to two paragraphs. See Petition, at 21-22. The Sixth Circuit properly distinguished these cases on

two grounds. First, they stand for the proposition that it is not always necessary to provide both a law library and legal assistance; they do not stand for the proposition that a court may never require such a combination. Slip Op., at 7-8. To the contrary, "every program 'must be evaluated on its own to establish, first, what the prisoners' needs for legal assistance are and, second, whether those needs are being met.' " *Id.* at 6, quoting *Kelsey* v. *Minnesota*, 622 F. 2d 956, 958 (8th Cir. 1980) (citations omitted).

Second, none of the cases from other circuits "involved a finding by the district court that there was an equal protection violation in that women inmates had less satisfactory access to the courts than male inmates." Slip Op., at 8. Here, the record reflects, and the district court found, that male inmates had better library facilities and had ten to thirty times the access to attorneys as did women. As a result of their better access, men had developed a self-help mechanism through use of skilled inmate legal aides. Women inmate legal aides simply lacked the history and skill of their male counterparts. None of the circuit decisions rejecting attorney assistance on specific factual records bars relief on the factual record here.

II. The Decision Below is Narrow and Limited Solely to This Record.

The Sixth Circuit's unpublished opinion makes no new law, is limited to a narrow review of a district court's remedial discretion and is expressly tied to this factual record. It thus has little or no applicability to other cases and does not warrant this Court's review.

Corrections has not preserved on appeal its challenge to the district court's factual findings and legal conclusions.[12] The case thus comes to this Court upon the following facts and legal conclusions: Corrections deprives KCIW inmates of equal protection[13] in their access to the courts by providing similarly situated men with superior law library facilities and substantially better trained, more experienced, inmate legal aides. Corrections also deprives KCIW inmates of meaningful access to the courts because the law library—however well stocked[14]—has insufficient space, light and study areas, is too noisy, has no tables available for re-

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[12]See n. 5.

[13]Corrections argues that the district court erred in finding equal protection violations in the absence of intentional sex discrimination. Petition, at 12-18. Not only was this argument not preserved, it is wrong on the law. Adverse effects from gender-neutral classifications offend the Constitution only if they constitute "purposeful discrimination". *Personnel Adm'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 274 (1979). However, "classifications based upon gender must bear a close and substantial relationship to important governmental objectives, and are in many settings unconstitutional." *Id.* at 272-73. Corrections has created a gender-based classification: women inmates receive specified access to the courts while male inmates receive different (and better) access. Gender-based classifications call for a heightened ("mid-tier") standard of review, *City of Cleburne, Tex.* v. *Cleburne Living Center*, 473 U.S. 432, 439 (1985), and are invalid unless substantially related to an important governmental interest. *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 727 (1982); *Craig* v. *Boren*, 429 U.S. 190, 198 (1976). Corrections has articulated no important interest served by providing women with inferior access to that provided men.

[14]Some inmates do not even have access to the library. *Canterino*, 562 F. Supp. at 110. They must rely entirely on inexperienced inmate legal aides.

search and is supervised solely by inexperienced inmate legal aides. Moreover, inmates have virtually no access to attorneys and the inmate legal aides lack the training to serve "as paralegal assistants . . . work[ing] under lawyers' supervision . . ." *Bounds,* 430 U.S. at 831.

This factual record serves as the sole basis for the Sixth Circuit's conclusion that the district court did not abuse its discretion in fashioning its limited remedy[15] to cure these constitutional deficiencies. These facts are unique. They require a close look at the physical configuration of the KCIW law library, an assessment of the training and skills of KCIW's inmate legal aides, and an evaluation of inmates' access to legal materials, lawyers and legal aides. They also require a comparison of library contents, physical structure, legal aides and attorney access for men inmates to those for women inmates. While similar cases may arise elsewhere, the limited legal issue—abuse of remedial discretion—can only be decided with reference to the unique facts of these cases. This case thus has limited applicability.

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[15]The district court ordered that an attorney be hired to assist and train women inmates, not necessarily to represent them. Thus, after the initial eighteen months, the court can evaluate whether women legal aides possess sufficient skills to serve—like their male counterparts—as experienced paraprofessionals.

CONCLUSION

For these reasons, the petition presents a narrow legal issue unique to the facts of this case. The Sixth Circuit's conclusion that the district court did not abuse its discretion in fashioning a limited remedy to cure the constitutional violations is consistent with the case law, amply supported by the record, and of limited applicability beyond this case. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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Counsel for Respondents

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES OF AMERICA - - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, OLIVER BOYD, having been duly sworn do depose and states as follows:

1. I am a Legal Aide at the Kentucky State Reformatory and have been for approximate (26) months.

2. I took the Legal Aide Course at Eddyville State Penitentiary, and since that time have participated in several follow-up advance courses supplied by the Public Advocate Office, at LaGrange.

3. Most of the complex problems involved were learned through reaction with other Legal Aide and other.

4. The Legal Aide Training Course, was helpful in several ways, but very limited due to several factors.

(1) Not enough Instructors to deal with particular areas.

(2) Then the O.P.A. cannot, and will not involve themselves in any Civil matters.

1. 2254 11.42 1983 approximate 30% including my own cases.
2. Domestic, approx. 50%, including Divorces, summons, Detainers, Lawsuits.
3. Internal Grievance 15%.
4. Five % Court Calls, and Direct Appeals.

(s) Oliver E. Boyd
Affiant

Subscribed and sworn to before me by Oliver Boyd, this 10th day of Sept. 1984. My commission expires: 17 Aug. 1986.

(s) Irma Dell Smith
Notary Public, State-at-Large, Ky.

(SEAL)

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES
OF AMERICA - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, CALVIN BUCHANAN, having been duly sworn, do depose and state as follows:

I am a legal aide at the KSR and have been assigned as such for a year. My prior experience as a aide was at KSP at Eddyville where I worked out of the legal office for five (5) years. I took the legal course but most of my learning has come from reading research and questioning attornies, para-legals and other residents who were known to have knowledge of civil or criminal law. My time at the office is used in the A.M. hours with Thursday being an exception for typing up the various materials. I may be working on at the time. Afternoons I am the assigned legal aide for the segregation area and the Reception Unit, plus the Hospital. I contact the O.P.A. anytime a resident has a direct appeal. My work mostly consists of the

post conviction actions (20%), civil (10%), Divorce (15%), Detainers (15%), appeals of adjustment committee (5%), hearings for residents' in Segregation. I usually put in 2½ to 3 hours a day for typing and/or research.

(s) Calvin Buchanan
Affiant

Subscribed and sworn to before me by Calvin Buchanan, this 10th day of September, 1984. My commission expires: 17 Aug. 1986.

(s) Irma Dell Smith
Notary Public, State-at-Large, Ky.

(SEAL)

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES OF AMERICA - - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, WALTER MCKINLEY HARRIS, having first been duly advised and sworn, do depose and state as follows:

1. That I am an inmate legal aide at Kentucky State Reformatory and have been assigned as such for approximately eighteen (18) months;

2. That I have had the basic legal training offered by the departments of corrections and public advocacy on at least three (3) separate occasions between October of 1977 and September of 1984; that I have had the advanced legal training offered by the aforesaid departments on at least two (2) separate occasions between October of 1977 and September of 1984; that I have achieved a marginal degree of proficiency in the areas of criminal and civil law (i.e., with respect to researching various issues and preparing, *inter alia,* RCr 11.42 motions, CR 60.02 motions,

CR 590.09 motions, habeas corpuses (state/federal), civil complaints, direct appeals in civil actions, appeals from denials of post-conviction motions and petitions, motions for discretionary review, petitions for writs and certiorari) through the aforementioned training and working on my own and othre prisoners' cases; and

3. That the majority of my working hours are devoted to assisting other prisoners with the preparation of post-conviction motions and divorce petitions (60% postconviction, 15% divorce petitions) and the remainder is relatively equally divided on dealing with other types of civil matters (prison conditions, negligence and/or malpractice (attorneys), child support, etc.).

MORE AFFIANT SAITH NAUGHT.

(s) Walter M. Harris
Affiant

Subscribed and sworn to before me by Walter McKinley Harris, this 10th day of Sept. 1984. My commission expires: Aug. 17, 1986.

(s) Irma Dell Smith
Notary Public, State-at-Large, Ky.

(SEAL)

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES
OF AMERICA - - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, WALLACE SCHOTT, being duly sworn, do depose and state as follows: I am a resident legal aide at the Kentucky State Reformatory and have worked as such for the last 19 months. I have obtained the biggest part of my knowledge from the collective pooling with the other five resident legal aides as well as from the Office of Public Advocacy and the para-legals who come to the resident legal aide office weekly. My time is primarily spent on post-conviction and domestic relations problems broken down as follows: 11:42 (60%), Detainers (10%), Sentence computation and other related sentencing problems (5%), Divorces (15%), Child Custody and Visitation (5%). The other 5% of my time is divided about equally between 1983 actions and 2254 actions. I do not fool with direct criminal appeals since the O.P.A.'s office does these in most all cases. I also try

to work with and share what knowledge and experience I have with incoming legal aides.

(s) Wallace E. Schott, Sr.
Affiant

Subscribed and sworn to before me by Wallace Schott, this 10th day of September, 1984. My commission expires: 17 Aug. 1986.

(s) Irma Dell Smith
Notary Public, State-at-Large, Ky.

(SEAL)

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES
OF AMERICA - - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, DEANNA JEAN ALLEN, after being first duly sworn, do hereby state as follows:

I am assigned to the Legal Aid Dept. as a Certified Legal Aid having worked in Legal Aid for over one year;

I have had a 2-week training course at KSR conducted by the Office of Public Advocacy. I was a Legal Secretary for 17 years prior to coming to KCIW, and as such was familiar with court documents and pleadings insofar as knowing how to draw them up; also my prior experience in law offices has helped me to assist Residents at KCIW with some civil matters, such as divorces.

Other than Domestic Relation Actions, I have never drafted any other legal documents or court pleadings for any resident at KCIW.

I have never drafted or filed any appellate court actions, or an 11.42 Motion; 60.02 Motion; 59.05 Motion; or Habeas Corpus actions, or any actions in Federal Court. I have listed these types of actions because my attorney asked if I knew *what* they were and *how* to draft them. It is extremely frustrating when residents ask assistance and help from me as a "Legal Aid" and I can't help them because of lack of legal training and no one to turn to for help.

I would like to be able to know how to legally research a matter by using the law books and legal library. There is a great amount of money expended for our law library but hardly no one knows "how" to use it!

I work part-time in Legal Aid on Saturdays from 12:00 to 4:00 when College classes are in session; however, when they aren't, I also work Tues., Wed. & Thurs. evenings from 4:00 to 7:00 P.M.

(s) Deanna Jean Alien
Affiant

Subscribed and sworn to before me by Deanne Jean Allen, this 13th day of September, 1984. My Commission expires: 5/18/88

(s) Dianne C. Childers
Notary Public, State-at-Large, Ky.

(SEAL)

APPENDIX F

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES OF AMERICA - - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, LYNNE GRAY, being first duly sworn state and depose: I am a resident Legal Aide at Kentucky Correctional Institute for Women. I have been assigned to this position since May 1, 1984. I attended the two week Legal Aide training given by the Public Advocacy in April, 1984 which was given at Kentucky State Reformatory.

I have filed a 1983 suit in Federal Court on my own behalf. However, I am to the Interrogatory and I do not have the knowledge to continue. Other than this I have only filed cases dealing with domestic relations. I have had no experience in any other type of pleadings. I have never filed, drafted, or worked on any 11.42 motions, 60.02 motion, 59.05 motion, Habeas Corpus, or any appellate case. I have listed these motions because my attorney asked if I knew of them. I have never heard of these motions. It

is frustrating when a resident asks for information which I do not have. I wish I had more training in using the law library, in doing research, and especially civil matters.

I work part-time on Saturdays and handle mostly Divorces, Temporary Custody, and Shock Probations.

(s) Lynne Gray
Affiant

Subscribed and sworn to before me by Lynne Gray, this 13th day of September, 1984. My commission expires: 5/18/88.

(s) Dianne C. Childers
Notary Public, State-at-Large, Ky.

APPENDIX G

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES OF AMERICA - - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, REBECCA KAY HARP, have being duly sworn state and decree the following:

1.) I am assigned a inmate legal aide at the Kentucky Correctional Institution for Women. I have been assigned in this position since February 1983.

2.) My training for this position consists of a 2 weeks Training given by the Dept. of Public Advocacy and one 2-day follow-up given a year later. I am also taking a correspondence course which I am paying for myself. I am the Senior Legal Aide at this present time by way of being here the longest. When I approached the institution about the cost of this course I was told that I would have to pay for it myself by Teresa Dickenson and that the institution would probably not pay for it. I was also asked to sign a statement that if I was to miss a payment that

the institution was not to be responsible for that payment. This statement was given to Ms. Kassulke.

3.) Other than Domestic Relations I have never filed any other type of Petitions in State or Federal Courts. I did assist one resident in a 1983 Civil Rights Action and things were not correct. Her friend in Eddyville wrote her and told me what to do in this action. I did not approach it on my own. I have never drafted an RCr 11.42, CR 60.02, CR 59.05, Habeas Corpus, Direct Appeal in civil action. The reason I know of these actions are because my attorney had asked if I had ever done these.

A lot of times I have called Barbara Parsons and David Marat of the Dept. of Public Advocacy and ask for assistance on what to do. Also I have experienced some incidents where residents have come to me seeking assistance and I was unable to do anything except write a letter to the Court clerk. I have also responded to them and ask for their assistance.

I also feel that our library could use improving. I still do not understand how to read the U.S.C.A. yet.

The hours that I work are 11:30 a.m. - 7:00 p.m., Tue., Wed., Thur. and 11:30 - 4:00 on Mon., Fri., Also I do work some Saturdays. I am the only full-time Legal Aide and there are 3 part-time Legal Aides also.

I would like to see someone come in and teach me more about Legal Research.

In the hours that I work, I read cases in the Law Books and spend some time in my sutdies.

Copies in Legal Aide have to be paid for by resident. When I first started in Legal Aide copies and postage was paid by Legal Aide Office.

(s) Rebecca Kay Harp
Affiant

Subscribed and sworn to before me by Rebecca Kay Harp, this 13th day of September, 1984. My Commission expires: 5/18/88.

(s) Dianne C. Childers
Notary Public, State-at-Large, Ky.

APPENDIX H

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0545-L(J)

PAT CANTERINO, et al., - - - - - - *Plaintiffs,*

AND

THE UNITED STATES OF AMERICA - - - - *Plaintiff-Intervenor,*

v.

GEORGE WILSON, et al., - - - - - *Defendants.*

AFFIDAVIT

I, JANICE HERT, being duly sworn state the following be true. I am presently am a Legal Aide at KCIW and have been working for 5 months. At a present time I worked for a year in 1982 to June 1983.

In 1982, I took the Legal Aide training for a two-week program. This was given at La Grange, Ky.

Other than domestic relation cases, I have never filed anything into Federal and State Courts. I've typed papers for other residents into courts, yet I'v never done the actual drafting of the paper.

I have never filed or drafted the following 11.42 motion, 60.02 motion, 59.05 motion, Habeas Corpus, or any Appellate Case. Some of the above motions I had never heard of or knew how to do until my attorney had mentioned it.

In the past, when one of the men residents was here, he would draft his own motions into court, and I would type them up. I have tried to use his file as a guideline.

– When someone comes to Legal Aide, and ask to file a motion, if I don't know anything about the motion its very embarassing.

When I work in Legal Aide I mostly do all Civil cases like divorces, temopary custody, power of attorney, shocks, name changes. My hours are 8:00 - 11:30 Monday thru Friday.

I also work as the Grievance Clerk, so I work Grievances with Legal Aide problems too!

I can also work doing Intra-State and Inter-State detainers.

(s) Janice Hert
Affiant

Subscribed and sworn to before me by Janice Hert, this 13th day of September, 1984. My Commission expires: 5/18/88.

(s) Dianne C. Childers
Notary Public, State-at-Large, Ky.

Supreme Court, U.S.
FILED
OCT 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-464

In The

Supreme Court of the United States

October Term, 1989

GEORGE W. WILSON, *et al.*,

Petitioners,

v.

PAT CANTERINO, a/k/a
PAT WILLIAMS, *et al.*,

Respondents.

AMICUS BRIEF FOR THE STATES OF TENNESSEE, ARIZONA, ARKANSAS, FLORIDA, IDAHO, IOWA, KANSAS, MICHIGAN, MISSOURI, NEW JERSEY, OHIO, SOUTH DAKOTA AND WYOMING IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether an order to hire private counsel to assist female inmates is constitutionally improper under the due process clause or the equal protection clause when the remedial order also directs specific improvements which created identical resources for access to the courts to female and male inmates.

II.

Whether affirmative sex-conscious relief granted to female inmates in an action under 42 U.S.C. § 1983 is constitutionally improper when the record is devoid of any evidence of an intent to discriminate and resources identical to those available to male inmates were ordered.

III.

Whether the equal protection clause, when applied in a female penal institution, requires equality rather than parity of treatment among female and male inmates.

IV.

Whether an order to hire private counsel to assist female inmates is constitutionally improper when the court failed to limit the duties of private counsel and set no standard by which such affirmative relief could end.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICI STATES 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT:

I. IMPOSITION OF AFFIRMATIVE SEX-CONSCIOUS RELIEF AT THE KENTUCKY WOMEN'S CORRECTIONAL INSTITUTION FOR WOMEN BY THE SIXTH CIRCUIT PURSUANT TO THE EQUAL PROTECTION CLAUSE WITHOUT A SHOWING OF AN INTENTION TO DISCRIMINATE BY CORRECTIONAL OFFICIALS IS AN IMPORTANT CONSTITUTIONAL ISSUE WHICH NEEDS TO BE SETTLED BY THIS COURT 4

II. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE CONFLICTS WITH THE DECISION OF AT LEAST ONE OTHER CIRCUIT REGARDING THE REQUIREMENT OF A FINDING OF DISCRIMINATORY PURPOSE IN AN EQUAL PROTECTION CLAIM WITHIN THE CONTEXT OF INMATE LAWSUITS 9

CONCLUSION 11

TABLE OF AUTHORITIES

Pages

CASES CITED:

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 8

Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989) 9, 10

Washington v. Davis, 426 U.S. 228 (1976) 7

No. 89-464

In The

Supreme Court of the United States

October Term, 1989

GEORGE W. WILSON, *et al.*,

Petitioners,

v.

PAT CANTERINO, a/k/a
PAT WILLIAMS, *et al.*,

Respondents.

AMICUS BRIEF FOR THE STATES OF TENNESSEE, ARIZONA, ARKANSAS, FLORIDA, IDAHO, IOWA, KANSAS, MICHIGAN, MISSOURI, NEW JERSEY, OHIO, SOUTH DAKOTA AND WYOMING IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The amici states urge that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-titled proceeding on April 10, 1989. The decision is unreported, but reprinted at pages 2a-12a of the Appendix to the Petition for Writ of Certiorari by George W. Wilson, *et al.* The petition for rehearing *en banc* was denied on June 22, 1989.

INTEREST OF AMICI STATES

All of the amici states have separate correctional institutions for women.[1] Of particular concern and interest to the amici states is the Sixth Circuit's application of the equal protection clause in affording affirmative "sex-conscious" relief without any finding of an intent to discriminate by the Kentucky prison officials. In the broader context, the application of the Sixth Circuit's analysis to any other programs provided at men's correctional facilities which may not be provided at women's correctional facilities is of particular concern.

Requiring states to provide women's correctional facilities with part-time attorneys to assist female inmates in filing lawsuits against state correctional officials in order to "catch up" with the frequency of lawsuits filed by male inmates would undoubtedly create needless and unnecessary litigation for state women's correctional facilities across this country.[2] All of the amici states are endeavoring to provide both men's and women's correctional facilities with adequate resources to enable both male and female inmates to bring lawsuits if necessary.

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[1] The Sixth Circuit decision may also impact upon the federal corrections system which has separate correctional facilities for women.

[2] Indeed, as Judge Suhrheinrich stated in his concurring opinion in this case, "[t]he affirmative relief ordered by the district court seems most likely to result in a further proliferation of baseless suits, rather than achieving the intended effect of providing female inmates with equal and constitutionally necessary access to the courts." *Canterino v. Wilson. et al.*, p. 10a (Appendix to Petition for Writ of Certiorari).

However, it is the position of the amici states that there is no constitutional requirement that they should be required to provide women's correctional facilities with the necessary resources including part-timed attorneys to "equalize" the frequency of lawsuits filed by female inmates with the frequency of lawsuits filed by male inmates in the absence of a showing of an intent to discriminate against female inmates. To do so would be to provide unnecessary affirmative relief where there has been no finding of a violation of the equal protection clause.

More importantly, if the analysis of the Sixth Circuit stands, state correctional officials under the equal protection clause of the Fourteenth Amendment could be required to "equalize" other programs between men's and women's correctional facilities, even in the absence of a showing of an intent to discriminate against the women inmates. There are a number of legitimate reasons why the programs in men's correctional facilities may be different than programs in women's correctional facilities. The Sixth Circuit's decision imposes new and constitutionally unnecessary additional burdens on state correctional officials whose budgets are already stretched to the limit in complying with other mandates of the Constitution. Thus, the amici states have a significant interest in the outcome of this case and will endeavor to show this Court the importance of this case and urge this Court to grant the petition for writ of certiorari.

STATEMENT OF THE CASE

The amici states rely upon the statement of the case as presented by George W. Wilson, *et al.*, in their petition for writ of certiorari at pages 4-11, in lieu of presenting their own statement of the case.

REASONS FOR GRANTING THE WRIT

I. IMPOSITION OF AFFIRMATIVE SEX-CONSCIOUS RELIEF AT THE KENTUCKY WOMEN'S CORRECTIONAL INSTITUTION FOR WOMEN BY THE SIXTH CIRCUIT PURSUANT TO THE EQUAL PROTECTION CLAUSE WITHOUT A SHOWING OF AN INTENTION TO DISCRIMINATE BY CORRECTIONAL OFFICIALS IS AN IMPORTANT CONSTITUTIONAL ISSUE WHICH NEEDS TO BE SETTLED BY THIS COURT.

The key language of the Sixth Circuit's decision with respect to this case is as follows:

> The cases on other jurisdictions which appear to conflict with our decision here are distinguishable from this case for one important reason: none involved a finding by the district court that there was an equal protection violation in that women inmates have less satisfactory access to the courts than male inmates. [Citations omitted]. The Fourteenth Amendment "requires, even in the context of prison conditions, that any such disparity [between the treatment of male and female inmates] must 'serve important governmental objectives' and must 'substantially relate to achievement of those objectives.' [Citation omitted]. Further, the "cost of protecting a constitutional right cannot justify its total denial."

Canterino v. Wilson, et al., pp. 8a-9a (Appendix to Petition for Writ of certiorari).[3]

Based upon this analysis, the Sixth Circuit affirmed the district judge's imposition of affirmative "sex-conscious" relief which requires Kentucky correctional officials to hire a part-time attorney for 18 months to provide legal assistance to women inmates at the Kentucky women's correctional institution. There is no dispute that there is a disparity between the frequency with which female inmates file lawsuits in Kentucky as opposed to male inmates. However, there is also no dispute that "no inmate testified that they wanted any legal services that they had not been able to receive [and] male inmates in Kentucky do not have an attorney assigned to their prisons." *Id.* at 3a.

Of troublesome significance is the fact that neither the district court nor the Sixth Circuit made any finding that Kentucky correctional officials intentionally discriminated against female inmates in creating this disparity. The mere existence of the disparity was sufficient for the Sixth Circuit to affirm the district court's imposition of affirmative "sex-conscious" relief against Kentucky correctional officials. Such a holding is a significant shift in the way in which prisoner equal protection claims are adjudicated. In that regard, Judge Guy in his dissenting opinion stated the following:

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[3] In distinguishing the "access to courts" cases cited by the Kentucky Corrections officials from the present case by relying upon the equal protection claim, the Sixth Circuit rests the holding of the case on equal protection not "access to court" grounds.

> As I understand the court's rationale, it found that the women had been denied meaningful access because they had not been provided the same access as the male inmates. This rationale does not withstand scrutiny. Initially, in order to establish an equal protection violation, plaintiffs must show that the state intentionally discriminated against women prisoners as a group for no legitimate reason. It is undisputed that, prior to the consent decree entered in the men's case in 1981, the law libraries at both KSR and KSP were also "woefully inadequate," therefore, at most, the male inmates enjoyed the benefit of a constitutionally adequate library for two years longer than the female inmates at KCIW. Furthermore, as the court pointed out in 1982, the Kentucky prison system housed a minimum of 2400 male prisoners and only 150 female inmates. Undoubtedly it is an historical fact that, due to the extremely disproportionate number of male inmates, the men have, by virtue of longer and more varied experience, acquired a greater level of expertise in meeting their own legal needs. I glean from this fact no evidence of any intentional discrimination against women as a class by the state.

Id. at 11a.

In order to affirm the district court's imposition of the affirmative "sex-conscious relief," the Sixth Circuit relied not on the female inmates' right to access to courts, but rather the equal protection clause. Such reliance might have been justified if there had been a finding of an intent to discriminate by the district court. However, the

Sixth Circuit made no reference to the necessity of such a finding of an intent to discriminate.[4]

Although this Court has held that a finding of discriminatory purpose is unnecessary in Title VII cases, it has refused to extend such a principle to claims of discrimination under the equal protection clause. In *Washington v. Davis*, 426 U.S. 228, 240 (1976), this Court stated as follows:

> As the court of appeals understood Title VII, employees or applicants proceeding under it need not concern themselves with the employer's possibly discriminatory purpose but instead may focus solely on the racially different impact of the challenged hiring or promotion practices. This is not the constitutional rule. We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable to Title VII, and we decline to do so today.
>
> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the due process clause in the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating

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[4] The Sixth Circuit was correct in concluding that in reviewing a district court's fashioning of relief where a constitutional violation is found, the standard of review is abuse of discretion. *Canterino v. Wilson, et al.*, pp. 4a-5a (Appendix to Petition for Writ of Certiorari) *citing Hoptowit v. Ray*, 682 F.2d 1237, 1245 (9th Cir. 1982). However, the error in this case is not the appropriateness of the relief afforded, but rather the elimination of the legal requirement that there must be a finding of discriminatory purpose for an equal protection claim.

> between individuals or groups. [Citation omitted]. But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects racially discriminatory purpose, is unconstitutional *solely* because it has racially disproportionate impact.

With reference to gender-based claims under the equal protection clause, this Court in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979), applied the two-step disparate impact and discriminatory purpose analysis. The first question as this Court indicated is whether the statutory classification is indeed neutral in the sense that it is not gender-based. The second question is whether the adverse effect reflects invidious gender-based discrimination. Disparate impact provides an important starting point as to the question of invidious discrimination; however, there must be a specific finding of a discriminatory purpose. *Id.* at 274.

In upholding the district court's affirmative "sex-conscious" relief without a finding of discriminatory purpose, the Sixth Circuit has eliminated one of the elements necessary for a plaintiff to prove an equal protection claim within the context of prison litigation. This Court has not specifically dealt with the question of whether a district court must find discriminatory purpose by prison officials before affording relief under the equal protection clause to an equally identifiable group such as women or minorities. Such an issue is an important question which should be reviewed by this Court.

More significantly, the impact of the Sixth Circuit's analysis in this case goes beyond providing a part-time attorney to the Kentucky Correctional Institution for

Women so they may "catch up" with the male inmates in the frequency of their lawsuits. What if there is a disparity in other programs offered at a women's prison versus a men's prison? What about a disparity in the programs offered at a prison for inmates with mental disabilities versus a men's prison? Under the Sixth Circuit's analysis, a mere showing of a disparity is sufficient to require affirmative relief under the equal protection clause even without the showing of a discriminatory purpose. Prison officials should be given the opportunity to give legitimate reasons as to why there may be disparity in the programs between prisons. The importance of this issue cannot be underestimated and should be addressed by this Court.

II. THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE CONFLICTS WITH THE DECISION OF AT LEAST ONE OTHER CIRCUIT REGARDING THE REQUIREMENT OF A FINDING OF DISCRIMINATORY PURPOSE IN AN EQUAL PROTECTION CLAIM WITHIN THE CONTEXT OF INMATE LAWSUITS.

There is a conflict between the decision of the Sixth Circuit and at least one other circuit with respect to the requirement that there must be a finding of invidious discriminatory purpose in order to maintain an equal protection claim in the prison context.

In the case of *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), the D.C. Circuit held that incarcerating long-term D.C. female offenders at a federal institution in West Virginia did not violate the equal protection clause even

though similarly situated male offenders were incarcerated in facilities closer to Washington, D.C. In particular, the D.C Circuit stated that the District's policy:

> does not embody invidious discrimination reflecting such forbidden factors as outmoded conceptions of the role of women in contemporary society. On the contrary, the District has demonstrated that it has sought to utilize federal resources in order to respond in some measure to the universally recognized blight of severe overcrowding that afflicts the District of Columbia prison facilities, while pursuing alternatives to alleviate the obvious hardships imposed on long-term women offenders by removing them so far from comforts and support of family and the resources that would otherwise be available to them in this community.

Id. at 1451. Judge Starr in writing the opinion for the D.C. Circuit in the *Pitts* case noted an important distinction between equal protection claims and claims for violations of individual rights:

> While an equal protection claim, too, is in one sense a personal right – i.e., the right not to be discriminated against – the claim is also a demand that governmental action that affects an individual not be predicated upon constitutionally defective reasoning. The claim charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties.

Id. at 1455.

This analysis of the D.C. Circuit conflicts with the holding of the Sixth Circuit in this case. The Sixth Circuit is analyzing the plaintiffs' equal protection claim like that

of an individual right by finding that a disparity alone is sufficient to constitute a violation of the equal protection clause. In addition to disparity, there must be a finding of discriminatory purpose as stated by the D.C. Circuit.

CONCLUSION

Based upon the foregoing authorities and analyses, the amici states urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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